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In The

Supreme Court of the United States

October Term, 1997

JANE ROE II,

Petitioner,

v.

ROBERT BUTTERWORTH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH AND IN FACT UNDERMINES AND OVERRULES *ROE v. WADE* AND *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY*?

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH AND IN FACT UNDERMINES AND OVERRULES OVER 100 YEARS OF U.S. SUPREME COURT BODILY AND SEXUAL PRIVACY CASES EXTENDING FROM *UNION PACIFIC RY. CO. v. BOTSFORD*; *OLMSTEAD v. UNITED STATES;* AND *SKINNER v. OKLAHOMA;* THROUGH *LOVING v. VIRGINIA; GRISWOLD v. CONNECTICUT; EISENSTADT v. BAIRD* AND *CARY v. POPULATION SERVICES*?

WHETHER THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE ELEVENTH CIRCUIT COURT'S ADHERENCE TO *BOWERS v. HARDWICK* AS STRICT STARE DECISIS, TO BOTH GAY AND NOW HETEROSEXUAL ADULT CONSENSUAL SEXUAL ACTIVITY AND ALL OF THE U.S. SUPREME COURT SEXUAL RIGHTS AND ABORTION DECISIONS CITED SUPRA IN ISSUES I AND II?

WHETHER THERE IS A FUNDAMENTAL, CONSTITUTIONAL, HUMAN, CIVIL AND GOD-GIVEN RIGHT TO HAVE SEX AND WHETHER THE STATE IS VESTED WITH INCHOATE OWNERSHIP OF THE BODY OF ITS CITIZENS AND MERELY LICENSES THEIR BODIES AND SEXUALITY TO THEM AT THE WHIM AND ARBITRARY

QUESTIONS PRESENTED – Continued

"MORAL" CONTROL AND "BROAD SOCIAL AGENDAS" OF THE STATE?

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT, IRRECONCILABLE CONFLICT WITH THE LONGSTANDING RATIONALITY AND REASONABLENESS REQUIREMENTS FOR ALL LEGISLATION, AT ANY LEVEL AND FOR ANY PURPOSE?

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS PERMITTING CRIMINALIZATION OF PROSTITUTION INHERENTLY DISCRIMINATES AGAINST WOMEN – AS WELL AS THE SINGLE AND UNMARRIED, THE HANDICAPPED, THE MUTILATED, THE UGLY, AND THE ELDERLY?

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS' OPINION AND FINDING OF FACT IGNORED THE PETITIONER'S UNREFUTED RECORD AND ANALYSIS OF PROSTITUTION UNREFUTEDLY ESTABLISHING THE LACK OF ANY COMPELLING (OR EVEN RATIONAL) STATE INTEREST IN CRIMINALIZING CONSENSUAL ADULT SEX FOR HIRE, BUT THE LEGAL AND FACTUAL RECORD DO ILLUSTRATE THAT THE STATE DOES HAVE LEGITIMATE COMPELLING INTERESTS IN ONGOING COMMERCIAL PROSTITUTION AS REGARDS TO (i) ZONING; (ii) HEALTH PROTECTION FOR BOTH WOMAN AND CLIENT; (iii) POLICE PROTECTION FOR THE WOMAN AND CLIENT; AND (iv) TAXATION AS IN ANY OTHER LAWFUL ACTIVITY?

QUESTIONS PRESENTED – Continued

WHETHER THE U.S. CONSTITUTION MUST BE TREATED BY THIS U.S. SUPREME COURT AS A LIVING DOCUMENT CAPABLE OF CONSTITUTIONAL FREEDOM AND INDIVIDUAL SPACE IN THE 21ST CENTURY AND OTHERWISE WHETHER THE U.S. HAS BECOME AN ARCHAIC, RELIGIOUS STATE THEOCRACY IN CLEAR VIOLATION OF THE FIRST AMENDMENT REQUIREMENT OF SEPARATION OF CHURCH AND STATE?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH AND IN FACT UNDERMINES AND OVERRULES *ROE v. WADE* AND *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY* 14

II. THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH AND IN FACT UNDERMINES AND OVERRULES OVER 100 YEARS OF U.S. SUPREME COURT BODILY AND SEXUAL PRIVACY CASES EXTENDING FROM *UNION PACIFIC RY. CO. v. BOTSFORD*; *OLMSTEAD v. UNITED STATES;* AND *SKINNER v. OKLAHOMA;* THROUGH *LOVING v. VIRGINIA; GRISWOLD v. CONNECTICUT; EISENSTADT v. BAIRD* AND *CARY v. POPULATION SERVICES* 22

III. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE ELEVENTH CIRCUIT COURT'S ADHERENCE TO *BOWERS v. HARDWICK* AS STRICT STARE DECISIS, TO BOTH GAY AND NOW HETEROSEXUAL ADULT CONSENSUAL SEXUAL ACTIVITY AND ALL OF THE U.S. SUPREME COURT SEXUAL RIGHTS AND ABORTION DECISIONS CITED SUPRA IN ISSUES I AND II 23

TABLE OF CONTENTS – Continued

Page

IV. THERE IS A FUNDAMENTAL, CONSTITUTIONAL, HUMAN, CIVIL AND GOD-GIVEN RIGHT TO HAVE SEX AND WHETHER THE STATE IS VESTED WITH INCHOATE OWNERSHIP OF THE BODY OF ITS CITIZENS AND MERELY LICENSES THEIR BODIES AND SEXUALITY TO THEM AT THE WHIM AND ARBITRARY "MORAL" CONTROL AND "BROAD SOCIAL AGENDAS" OF THE STATE 24

V. THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT, IRRECONCILABLE CONFLICT WITH THE LONG-STANDING RATIONALITY AND REASONABLENESS REQUIREMENTS FOR ALL LEGISLATION, AT ANY LEVEL AND FOR ANY PURPOSE 25

VI. THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS PERMITTING CRIMINALIZATION OF PROSTITUTION INHERENTLY DISCRIMINATES AGAINST WOMEN – AS WELL AS THE SINGLE AND UNMARRIED, THE HANDICAPPED, THE MUTILATED, THE UGLY, AND THE ELDERLY 27

TABLE OF CONTENTS – Continued

Page

VII. THE ELEVENTH CIRCUIT COURT OF APPEALS' OPINION AND FINDING OF FACT IGNORED THE PETITIONER'S UNREFUTED RECORD AND ANALYSIS OF PROSTITUTION UNREFUTEDLY ESTABLISHING THE LACK OF ANY COMPELLING (OR EVEN RATIONAL) STATE INTEREST IN CRIMINALIZING CONSENSUAL ADULT SEX FOR HIRE, BUT THE LEGAL AND FACTUAL RECORD DO ILLUSTRATE THAT THE STATE DOES HAVE LEGITIMATE COMPELLING INTERESTS IN ONGOING COMMERCIAL PROSTITUTION AS REGARDS TO (i) ZONING; (ii) HEALTH PROTECTION FOR BOTH WOMAN AND CLIENT; (iii) POLICE PROTECTION FOR THE WOMAN AND CLIENT; AND (iv) TAXATION AS IN ANY OTHER LAWFUL ACTIVITY..... 27

VIII. THE U.S. CONSTITUTION MUST BE TREATED BY THIS U.S. SUPREME COURT AS A LIVING DOCUMENT CAPABLE OF CONSTITUTIONAL FREEDOM AND INDIVIDUAL SPACE IN THE 21ST CENTURY AND OTHERWISE WHETHER THE U.S. HAS BECOME AN ARCHAIC, RELIGIOUS STATE THEOCRACY IN CLEAR VIOLATION OF THE FIRST AMENDMENT REQUIREMENT OF SEPARATION OF CHURCH AND STATE..... 29

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

44 LiquorMart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 34 L.Ed.2d 711 (May, 1996) 16

Allegeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897) 25

Bennis v. Michigan, 64 U.S.L.W. 4124, 134 L.Ed.2d 68 (1996) 15

Bowers v. Hardwick, 478 U.S. 186 (1986) ..... *passim*

Buck v. Bell, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) 19

Cary v. Population Services, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) 22

City of Boerne v. Flores, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) 13

Compassion in Dying, 49 F.3d 586 (9th Cir. 1996) 17

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) 22, 23, 24

Ferguson v. Skrupa, 372 U.S. 726 (1963) 25

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 22

In Re: P., 400 N.Y.S.2d 455 (N.Y.Sup.Ct., N.Y. County, 1977) 15

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) 22

Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803) 13

TABLE OF AUTHORITIES – Continued

Page

Olmstead v. United States, 277 U.S. 438, 485 S.Ct. 564, 72 L.Ed. 944 (1928) 22

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 14

Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) 25

Roe II v. Butterworth, 958 F.Supp. 1569 (S.D. Fla. 1997) 2, 20, 23, 24

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 14

Romer v. Evans, 116 S.Ct. 1620 (1996) 18

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) 22

U.S. v. Virginia, et al., 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) 27

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) 22

STATUTES

28 U.S.C. § 1331 2

Chapter 796, Fla. Stat 1

§ 796.07(1)(a), Fla. Stat 1, 2

§ 798.01, Fla. Stat 11

§ 798.02, Fla. Stat 11

§ 800.02, Fla. Stat 11

§ 22-301, District of Columbia Code 11

§ 22-1001, District of Columbia Code 11

PETITION FOR WRIT OF CERTIORARI

The Petitioner, JANE ROE II, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 24, 1997, in order to resolve the conflict between the Eleventh Circuit Court of Appeals decision relying on *Bowers v. Hardwick* and numerous U.S. Supreme Court cases on the vitally important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has been published and that gives rise to this petition. It is reprinted in Appendix A and Appendix B hereto at pages App. 1-37.

JURISDICTION

On March 10, 1995, the United States District Court for the Southern District of Florida issued a Final Order decision denying petition to have Florida's law, Chapter 796, Fla. Stat., criminalizing prostitution declared unconstitutional. On November 24, 1997, the Eleventh Circuit Court of Appeals entered a decision adopting fully the opinion of the District Court in a Per Curiam affirmance.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the November 24, 1997 Per Curiam opinion.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Florida Statutes Section 796.07(a), the definitional section of the criminalization of prostitution Chapter 796, Fla. Stat., reads:

796.07(1)(a). Prohibiting prostitution, etc.; evidence; penalties; definitions

(1) As used in this section:

(a) "Prostitution" means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.

STATEMENT OF THE CASE

The Petitioner, JANE ROE II, was formally a highly successful call girl in Southeast Florida whose professional work as a prostitute was proscribed criminally and who wished to go back to work, thus subjecting herself again to criminal prosecution. *See* Appendix D. She has always *chosen* to keep her professional and private sexual activities confined to heterosexual relationships. On November 29, 1994, the Petitioner, individually, voluntarily, and without any legal compulsion of any kind or character, criminal or civil, filed a civil Petition for Declaratory Judgment and Injunction pursuant to Federal question jurisdiction under 28 U.S.C. § 1331. *See* Appendix C. This Petition requested the Federal District Court for the Southern District of Florida, Judge Jose A. Gonzalez, Jr., declare that the law of the State of Florida, Chapter 796, Fla. Stat. criminalizing prostitution – sexual activity for hire – unconstitutional under the Fourteenth Amendment of the United States Constitution. On March 10, 1997, the Federal District Court entered its decision as a Final Order, *Roe II v. Butterworth*, 958 F.Supp. 1569 (S.D. Fla. 1997). *See* Appendix D. The Court reconfirmed that the Petitioner had standing to bring her legal action and also left intact the Petitioner's factual record, perhaps the first comprehensive record and analysis of prostitution and human sexuality even before submitted to a Court. Nonetheless, the Federal District Court ignored this unrefuted record in making its findings of fact. On March 18, 1997, the Petitioner filed her Notice of Appeal. No Cross-Notice of Appeal was filed by the Respondent. On November 24, 1997, the Eleventh Circuit Court of Appeals, entered a Per Curiam affirmed judgment fully adopting the reasoning and opinion of the Federal District Court as its own opinion. *See* Appendix A. Therefore, all references to the Federal District Court opinion in this *Roe II v.*

Butterworth case, *supra,* will now be referred to as the ruling of the Eleventh Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

Introduction

Sex! The very *raison d'etre* for life itself and one of the three most basic human necessities: food, shelter and sex. No society or culture can exist without them. In fact, many, many think that sex – and the drive for sex – is the primary reason for life itself.

Despite this obvious and overwhelming influence of sex on our personal, private, social and economic behavior, Richard Posner, the "conservative but iconoclastic legal scholar," Chief Judge of the Seventh Federal Circuit Court of Appeals in Chicago, says "*that ignorance of things sexual by members of the judiciary*, and by society generally, *has produced woeful results*." (Emp. added.) *See International Herald Tribune,* December 29, 1997, *An Explicit Frontier on U.S. Campuses: Sex Studies*, by Ethan Bronner. *See also Bowers v. Hardwick*, 478 U.S. 186, 193 (1986). In that article, Judith Shapiro, President of Barnard College, a veteran of gender studies also speaks: "Through such studies, students are forced to ask the most basic questions *about how society organizes itself and that is the very essence of a liberal [and constitutional] education.*" *Id.* (Emp. added.) And two other academic voices in the article chime in:

> 'There is still a lack of good, basic research into the fundamentals of *human sexualities*,' said John Bancroft, an English medical researcher who now heads the Kinsey Institute at Indiana University. '*In other important aspects of behavior you find a much more consistent body of scientific endeavor.* It is regarded as something we need to know about. *Sex is not like that. There has been a long-standing fear of knowledge in that area* [because it's criminal].' (Emp. added.)

. . .

> Susan Tate, who teaches the Sexuality Today course at the University of Virginia, said it was that fear she sought to address when she had students build genitals from Play-Doh.
>
> 'If we can discuss the heart, stomach and elbow without embarrassment,' she said, 'we should be able to talk about the penis, clitoris and vagina without laughing. *I'm trying to tell the students what's good about sex. All they hear is what's bad about it, how it can kill you.*' . . .
>
> Some of the material offered under these courses flows from women's studies. *Where at one time women's studies raised issues about equal pay, the field now is often cast as gender studies and examines societal construction of sexual identity.* (Emp. added.)

This lack of empirical data on sex moving into the 21st Century is monstrous for a modern constitutional state and indeed, its negative repercussions have been felt from the White House and the U.S. Supreme Court to the reaches of the outest most American house. Indeed, **adult consensual sex in America has now become a weapon instead of an essential human, civil and constitutional right and necessity**. The good news is that modern sex researchers have, in fact, after over 20 years of ground-breaking research, established a long overdue application of an old scientific principal in a discipline known as "evolutionary biology" or "evolutionary psychology." The book *Sperm Wars: The Science of Sex*, Basic Books, a Division of HarperCollins Publishers, 1996, written by the world acclaimed, evolutionary biologist Robin Baker, Ph.D. says it best on its dust jacket:

> "*Ah, sex! The poets said it was about love; libertines about lust; psychologists about unmet emotional needs.*"
>
> In a book as revolutionary as the original Kinsey Report or the work of Masters and Johnson, Robert Baker, an evolutionary biologist, demonstrates that

our sexual behavior – in all its love-enhancing, relationship-destroying, exquisitely pleasurable, risky, and exotic and erotic forms – is driven neither by our psyches nor our conscious minds, but by biological imperatives that evolution programmed into us millions of years ago. These imperatives create a competition the author calls *sperm warfare*.

For more than a decade, Baker did biological ground-breaking research, observing human sperm and female cervical mucus in every possible type of sexual encounter – from routine sex to masturbation to group sex – in search of answers to questions such as:

- Why do we crave sex so regularly, when most of the time we are not interested in procreating?
- Why is the female orgasm so unpredictable, and what is its role in conception?
- Why do we get such strong urges to masturbate, and why do we yield to these urges only in secrecy?
- Why, in the midst of perfectly happy and satisfying relationships, do we find ourselves drawn to outside sexual encounters, often with partners we would never consider as mates?

Baker found that sperm warfare answered all these questions, by showing that the male's sexual behavior is predicated on the expectation that during sex – or soon afterward – his sperm will find itself in competition with other men's sperm to fertilize the descending egg. Even more surprising, Baker found that women are hardwired to promote this competition.

For the male, a victory in any one battle of this war means that his genes will survive him. For the female, sperm warfare assures that any sperm that fertilizes her egg will have earned its right to do so, giving her offspring a better chance at survival. *And so, no matter our sex, no matter our morals, we are*

all biologically driven by this programming to engage in sexual behavior that is often in conflict with the rational plans we make for our lover relationships. (Emp. added.)

In an earlier, highly praised publication in this same sexual field, *The Moral Animal: Why We Are The Way We Are: The New Science of Evolutionary Psychology*, Vintage Books, a Division of Random House, Inc. 1994, the award winning author Robert Wright states:

Introduction: Darwin and Us

The Origin of Species contains almost no mention of the human species. The threats the book posed – to the biblical account of our creation, to the comforting belief that we are more than mere animals – were clear enough; Charles Darwin had nothing to gain by amplifying them. Near the end of the final chapter he simply suggested that, through the study of evolution, "light will be thrown on the origin of man and his history." And, in the same paragraph, he ventured that "in the distant future" the study of psychology "will be based on a new foundation."

Distant was right. In 1960, 101 years after the *Origin* appeared, the historian John C. Greene observed, "With respect to the origin of man's distinctively human attributes, Darwin would be disappointed to find matters little advanced beyond his own speculations in *The Descent of Man*. He would be discouraged to hear J.S. Weiner of the Anthropology Laboratory at Oxford University describe this subject as 'one large baffling topic on which our evolutionary insight remains meager' . . . In the current emphasis on man's uniqueness as a culture-transmitting animal Darwin might sense a tendency to return to the pre-evolutionary idea of an absolute distinction between man and other animals."

A few years after Greene spoke, a revolution started. Between 1963 and 1974, four biologists – William Hamilton, George Williams, Robert Trivers, and John Maynard Smith – laid down a series of ideas that, taken together, refine and extend the theory of natural selection. These ideas have radically deepened the insight of evolutionary biologists into the social behavior of animals, including us.

. . .

Here "world view" is meant quite literally. The new Darwinian synthesis is, like quantum physics or molecular biology, a body of scientific theory and fact; but, unlike them, it is also a way of seeing everyday life. Once truly grasped (and it is much easier to grasp than either of them), it can entirely alter one's perception of social reality.

. . .

A QUIET REVOLUTION

The new Darwinian social scientists are fighting a doctrine that has dominated their fields for much of this century: the idea that biology doesn't much matter – . . . Even psychologists – who might be expected to argue on behalf of the human mind – have often depicted it as little more than a blank slate. *Behaviorism, which dominated psychology for a good part of this century, consists largely of the idea that people tend habitually to do what they are rewarded for doing and not do what they are punished for doing; thus is the formless mind given form.* In B.F. Skinner's 1948 utopian novel *Walden II*, envy, jealousy, and other antisocial impulses were being eliminated via a strict regime of positive and negative reinforcements.

This view of human nature – as something that barely exists and doesn't much matter – is known among modern Darwinian social scientists as "the standard social science model." Many of them

learned it as undergraduates, and some of them spent years under its sway before beginning to question it. After a certain amount of questioning, they began to rebel.

In many ways, what is now happening fits Thomas Kuhn's description of a "paradigm shift" in his well-known book *The Structure of Scientific Revolutions*. A group of mainly young scholars have challenged the settled world view of their elders, met with bitter resistance, persevered, and begun to flourish. Yet however classic this generational conflict may seem, it features a couple of distinctive ironies. (Emp. added.) *Id.* at 3-6.

. . .

The great gulf between these two forms of sex is one of the most famous elements of Victorian sexual morality – the "Madonna-whore" dichotomy. There were two kinds of women: the kind a bachelor would later marry and the kind he might now enjoy, the kind worthy of love and the kind that warranted only lust. A second moral attitude commonly traced to the Victorian age is the sexual double standard. Though this attribution is misleading, since Victorian moralists so strongly discouraged sexual license in men and women, it's true that a Victorian man's sexual extravagance raised fewer eyebrows than a woman's. It's also true that this distinction was closely linked to the Madonna-whore dichotomy. The great punishment awaiting a sexually adventurous Victorian woman was permanent consignment to the latter half of the dichotomy, [and now criminal incarceration and stigmatization] which would greatly restrict her range of available husbands [and jobs, social portability, etc].

There is a tendency these days to reject and scoff at these aspects of Victorian morality. Rejecting them is fine, but to scoff at them is to overestimate our own moral advancement. The fact is that

many men still speak openly about "sluts" and their proper use: great for recreation, but not for marriage. *And even men (such as well-educated liberal ones) who wouldn't dream of talking like that may in fact act like that. Women sometimes complain about seemingly enlightened men who lavish respectful attention on them but then, after sex on the first or second date, never call again, as if early sex had turned the woman into a pariah.* Similarly, while the double standard has waned in this century, it is still strong enough for women to complain about. *Understanding the Victorian sexual climate can take us some distance toward understanding today's sexual climate.*

The intellectual grounding of Victorian sexual morality was explicit: women and men are inherently different, most importantly in the libido department. Even Victorians who railed against male philandering stressed the difference. Dr. [William] Acton wrote: "I should say that the majority of women (happily for them) are not very much troubled with sexual feeling of any kind. What men are habitually, women are only exceptionally. It is too true, I admit, as the divorce courts show, that there are some few women who have sexual desires so strong that they surpass those of men." *This "nymphomania" is "a form of insanity."* Still, "there can be no doubt that sexual feeling in the female is in the majority of cases in abeyance . . . and even if roused (which in many instances it never can be) is very moderate compared with that of the male." One problem, said Dr. Acton, was that many young men are misled by the sight of "loose or, at least, low and vulgar women." They thus enter marriage with exaggerated notions of its sexual content. *They don't understand that "the best mothers, wives, and managers of households, know little or nothing of sexual indulgences. Love of home, children, and domestic duties,*

are the only passions they feel." (Emp. added.) *Id.* at 29, 30.

. . .

The second point to grasp before pondering how natural selection has "decided" to shape the sexual preferences of women (and of men) is that it isn't foresightful. *Evolution is guided by the environment in which it takes place, and environments change. Natural selection had no way of anticipating, for example, that someday people would use contraception, and that their passions would thus lead them into time-consuming and energy-sapping sex that was sure to be fruitless; or that X-rated videotapes would come along and lead indiscriminately lustful men to spend leisure time watching them rather than pursuing real, live women who might get their genes to the next generation.*

This isn't to say that there's anything wrong with "unproductive" sexual recreation. *Just because natural selection created us doesn't mean we have to slavishly follow its peculiar agenda. (If anything, we might be tempted to spite it for all the ridiculous baggage its saddled us with.)* (Emp. added.) *Id.* at 37.

And, in direct contradiction to the Eleventh Circuit Court of Appeals' factual findings, Robert Wright paints a picture of a much different *rational, biological morality*:

The intermittently moralistic tone of this chapter is in a sense ironic. Yes, on the one hand, the new Darwinian paradigm does suggest that any institution as "unnatural" as monogamous marriage may be hard to sustain without a strong (that is, repressive) moral code. But the new paradigm also has a countervailing effect: nourishing a certain moral relativism if not, indeed, an outright cynicism about moral codes in general.

The closest thing to a generic Darwinian view of how moral codes arise is this: *people tend to pass the*

> *sorts of moral judgments that help move their genes into the next generation* (or, at least, the kinds of judgments that would have furthered that cause in the environment of our evolution). *Thus a moral code is an informal compromise among competing spheres of genetic self-interest*, each acting to mold the code to its own ends, using any levers at its disposal. (Emp. added.) *Id.* at 146.
>
> . . .
>
> *If you buy this way of looking at moral codes, you won't expect them to serve the interests of society at large. They emerge from an informal political process that presumably gives extra weight to powerful people; they are quite unlikely to represent everyone's interests equally (though more likely to do so, perhaps, in a society with free speech and economic equality.) And, there's definitely no reason to assume that existing moral codes reflect some higher truth apprehended via divine inspiration or detached philosophical inquiry.* (Emp. added.) *Id.* at 147.

Criminalization of prostitution, (and all adult consensual criminal sex laws)[1] are based strictly on the exact opposite of the great American success story of unfettered, rational respect for truth, real history and science. But, tragically, America is still ruled by ancient, archaic, irrational, religious mysticism in their adult consensual sex lives with dire consequences.

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[1] There are two civil cases presently pending in the Federal District Courts challenging the constitutionality of adult consensual sex crime laws. *Howard Fletcher-Scaman v. Chiles and Krischer*, Docket No.: 97-8915-CIV-MOORE, (Southern District of Florida) challenging Florida's criminal adult consensual sex statutes, § 798.01, § 798.02, § 800.02, Fla. Stat.; and *Howard Fletcher-Scaman v. Barry, et al.*, Docket No. 1:98CV00271-CKK in the Federal District Court for the District of Columbia challenging § 22-301, Adultery and § 22-1001, Fornication, District of Columbia Code. These statutes could only be upheld under *Bowers v. Hardwick*, *infra*, and the Eleventh Circuit Court of Appeals' decision resting squarely on *Bowers*. **Bad law for the minority is bad law for the majority.**

The grossly patriarchal Bible, adopted by the nomadic, migrant working men of the Judeo-Christian religious tribes spiting female deities in the far greater civilizations of Syria, Babylonia, Sumer, and Egypt) provides that the relationship between men and women shall be damned ab initio with hatred (Genesis 3:15-16): And I will put *enmity between you and the woman* and between your offspring and hers; . . . *Your desire will be for your husband, and he will rule over you.*" (Emp. added.)

In truth, gross subjugation of female sexuality to an inferior, economic dependent status on men became the basis and essence of the Judeo-Christian socio-sexual "ethic." This was pure male embezzlement of female sexuality and enslavement of the female gender which can't be assigned to a purely "unchristianized," vengeful, Hebrew God. *See* The New Testament, I Timothy 2:9-15:

> I also want women to dress modestly, with decency and propriety, . . . *A woman should learn in quietness and full submission, do not permit a woman to teach or to have authority over a man; she must be silent.* For Adam was formed first, then Eve. *And Adam was not the one deceived; it was the woman who was deceived and became a sinner.* But women will be saved through childbearing – if they continue in faith, love and holiness with propriety. (Emp. added.)

To religious fundamentalists and patriarchal males, female jurists are an abomination to the word of God, and, if religious "public" morality is a basis for criminalizing Americans, then who amongst us can claim that they're not an enemy of the State.

The 5-4 *Bowers v. Hardwick*, *supra*, decision is one of the very low points of the U.S. Supreme Court's honored pantheon of historic cases (*Bowers v. Hardwick* is what the Petitioner calls one of the Court's "hate cases"). This culminated in the criminalization of tens of millions of citizens, many, many of

whom are indeed some of America's best and brightest.[2] Now garden variety heterosexual sex is at issue before this Court, and *Bowers*' homophobic face has been given a new lift despite this Court's re-emphasis of *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803), in *City of Boerne v. Flores*, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) with another "big brother" intrusion. "Public morality" and "broad social agendas" are code words for privately imposed, patriarchal morality and irrational religious mysticism adopted by the State as its standard for criminalization of its citizens. This is called a "theocracy," not a democracy. Perhaps this lawsuit is not nearly as much about prostitution or sex as it is about basic human freedom, common human decency, and constitutional respect.

Without a full, constitutional commitment to protect the people's adult, consensual, fundamental bodily and sexual rights – including a definitive end to the State's forcing of women to give away their sexuality for free – then rational constitutional democracy does not exist in America for peaceful, non-violent Americans. Many women have quietly used sex for hire during transistional times of education, divorces and pregnancies. The great 20th Century whore, deceased U.S. Ambassador to France, Pamela Harriman, certainly wasn't embarrassing to any country. Accordingly, this Honorable U.S. Supreme Court must grant this Petition to guarantee and insure that we live in a free, rational, constitutional, society, and not a theocracy. (We are now in 13th place on the United Nations freedom listing.) As one German put it: "America: The land of the free where everything is illegal."

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[2] Essentially, the *Bowers* Court ruled that the gay philosopher Plato, the father of rational western cultural thought; Julius Caesar, who was "every woman's man and every man's woman;" King Richard I, the "Lionhearted," who consumed his sexual lust with his lover, the King of France, and J. Edgar Hoover, who had a gay "marriage" with his Chief FBI Assistant, Clyde Tolson, are all criminals. *See* also Cary Grant and Ellen Degeneris.

I. The opinion of the Eleventh Circuit Court of Appeals is in direct conflict with and in fact undermines and overrules *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

To argue that there is a right to a *commercially transacted* abortion under *Roe v. Wade* and destruction of a fetus for compensation, as a matter of Fourteenth Amendment due process rights, liberty interests and the right of privacy, without undue interference from the state and then to rule that an adult woman has no human, civil or constitutional right to control her own body to choose between giving her own sexuality away for free or for hire with any form of compensation, is legally a charade and logically farcical and clearly overrules and undermines the abortion rights cases. Inevitably, when there is no legal or rational factual basis supporting a legitimate compelling interest justification, the "fudge" factor becomes "morality" and "broad social agendas." And all the while, there has been a stunning reversal of the American household from "Ozzie and Harriet" to "Seinfeld," et al. *See* Appendix H.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra*, Justice Sandra Day O'Connor, along with her male brethren, Justices Kennedy and Souter, wrote the opinion for the majority of the Court stating:

> ***Our obligation is to define the liberty of all, not to mandate our own moral code*** . . .
>
> Our law affords constitutional protection to *personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education* . . . These matters, involving the *most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of*

human life . . . (Emp. added.) *Id.* at S.Ct. at 2806, L.Ed.2d at 697.

Furthermore, in a 1977 U.S. Civil Rights Commission Report entitled *Sex Bias in the U.S. Code*, co-author Columbia University Law Professor Ruth Bader Ginsburg wrote affirmatively: "Although S. 1400, sec.1841, in contrast to the Mann Act which it would replace, is cast in sex-neutral form, *retaining prostitution business as a crime in a criminal code is open to debate*." *Id.* at 99. (Emp. added). She further wrote: "Repeal these [all Federal prostitution criminal] sections," lamenting:

> . . . sex-neutralizing the statutory language is unlikely to effect significant substantive change, *for enforcement concentrates on the female even when male prostitution is encompassed in the same category*. With the exception of several communities where it is police policy to arrest the client also, it is [un]realistic to expect that vigorous enforcement will be directed against the person who patronizes a prostitute. (Emp. added.) *Id.* at 103.[3] *See* Appendix I.

The third female jurist's opinion that the Eleventh Circuit Court of Appeals refused to recognize was New York State Supreme Court (Trial) Judge Margaret Taylor's strong opinion in *In Re: P.*, 400 N.Y.S.2d 455 (N.Y. Sup.Ct., N.Y. County, 1977). In that case, a female juvenile was charged in a delinquency petition with prostitution. The Court held that "*the method of enforcement of the prostitution laws is sex biased, aimed only at punishing the female prostitute*" (emp. added) *id.* at 460, and that "*sex is a suspect classification . . .* " *id.* at 459. The female New York Supreme Court Justice also ruled, consistent with Justice Ruth Bader Ginsburg's writings, that the "right of privacy encompasses not just sexual conduct in the marital relationship . . . including in its protection *each individual's decision as to whether, when, and in what manner, he*

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[3] The Petitioner believes that Justice Ginsburg decided to vote with the majority in the 5-4 *Bennis v. Michigan*, 64 U.S.L.W. 4124, 134 L.Ed.2d 68 (1996) decision because she finally wished to punish "johns" in the same way women have been unconstitutionally punished for prostitution. (In Michigan, adult consensual oral sex is a felony! *See* Appendix F.)

or she will engage in private intimate relations. [the fundamental right to have sex for free or for hire] *See infra.*" *Id.* at 464, and that " . . . *The right of privacy does not attach to the marital relationship but to the individuals involved. Accord, e.g., Eisenstadt, supra.*" (Emp. added.) *Id.* at 462.

In *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 34 L.Ed.2d 711 (May, 1996), the U.S. Supreme Court, rejected such notions as "paternalism" and "weakism" toward Americans by squashing economic price competition in the liquor industry. This *44 LiquorMart* case also rejected notions that it is rational to enact a law that doesn't work and has been proven not to work. When has criminalization of prostitution against women and/or men ever worked? Until women – and all Americans – *own their own God-given sexuality free* from State criminalization and pernicious intrusion, the economic and political equality of women will never be achieved. The Eleventh Circuit Court of Appeals wrote:

> "This Nation's laws are constantly based on notions of *morality*," *Bowers v. Hardwick*, 478 U.S. at 196; such laws are crucial to a stable and conscientious society. *Because every individual's concept of morality may differ, the only legitimate basis for imposing a particular set of mores upon a population is democratic consensus*; [apparently, individual freedom of choice means nothing to the Eleventh Circuit Court of Appeals] and the only limitation our Constitution places on this rule of the majority is to insure that such laws are applied to all with an even hand, and that certain [The Petitioner was under the belief that all constitutional fundamental rights were protected, not just certain ones] fundamental rights are not infringed. *Petitioner, however, would have this Court follow a different course by allowing her to impose her mores – which are shared by a diminutive minority [there is absolutely nothing in the Court's record to substantiate this judicial finding of fact] – upon the majority. This the Court cannot do, for while our Constitutional system may be "counter-*

majoritarian" in certain instances, it is not "pro-minoritarian." (Emp. added.) *Id.* at 1582, 1583.

And, the Eleventh Circuit Court not only blindly ignored the record, but the Court paid express homage to Justice Scalia's constitutionally regrettable and embarrassing theory that the minority, in protecting their basic human rights, is really attempting to impose their own morality on the majority. Choice *is* freedom. Disingenuously, while relying on the hateful *Bowers v. Hardwick* case,[4] the Eleventh Circuit Court of

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[4] Specifically, Circuit Court Chief Judge Richard Reinhardt in his en banc opinion in *Compassion in Dying*, 49 F.3d 586 (9th Cir. 1996) decision, wrote:

> In this respect, *Bowers v. Hardwick*, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986), would appear to be aberrant and to turn on the specific sexual act at issue. In *Bowers*, the Court held that the Constitution does not "confer a fundamental right upon homosexuals to engage in [homosexual] sodomy. . . . " 478 U.S. at 190. We do not believe that the *Bowers* holding controls the outcome here or is in any way inconsistent with our conclusion that there is a liberty interest in dying peacefully and with dignity. *[having sexuality is far more important to enjoy peacefully and with dignity.] We also note, without surprise, that in the decade since Bowers was handed down the Court has never cited its central holding approvingly.* (Emp. added.)
>
> *The case was decided by a 5-4 vote, and Justice Powell subsequently announced on several occasions that he regretted that vote. "I think I probably made a mistake,"* Powell reportedly once said. Upon re-reading the opinion a few months after it was issued, he remarked, "I thought the dissent had the better of the argument." David Cole, Playing Pornography's Rule: The Regulation of Sexual Expression, 143 U. Pa. L. Rev. 111, 176-77 (1994), citing Linda Greenhouse, When Second Thoughts in a Case Come Too Late, N.Y. Times, Nov. 5, 1990, at 14. *The Bowers decision has been widely criticized by commentators.* William N. Eskridge, Jr. and Phillip P. Frickey, The Supreme Court 1993 – Forward: Law as Equilibrium, 108 Harv. L. Rev. 26, 95 (1994) (criticizing *Bowers* for embodying "segregationist" caste

Appeals simply *ignored* Justice Scalia's dissent in *Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996) which was expressly quoted by the Petitioner to the Eleventh Circuit:

> [It was a m]odest attempt by seemingly tolerant Coloradans *to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. [Isn't that precisely how democracy is supposed to work: a minority in America protects itself from the majority by gaining political power?] In holding that homosexuals cannot be singled out for this favorable treatment the Court contradicts the decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick*, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) *and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias*. (Emp. added.) [To tens of millions of gay and lesbian American taxpayers it is.]

But just so there can be absolutely no lingering doubt as to what happens when pseudo-moralists use the State to run amuck over secular, rational government and individual rights, the Petitioner offers the following:

> Prostitution is a disgrace to humanity, but it cannot be eliminated by moral lectures, pious intentions, etc.; its limitation and final abolition presuppose the elimination of innumerable preconditions. *Infra* at 251.

. . .

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distinctions similar to those upheld in *Plessy v. Ferguson*); Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of *Bowers v. Hardwick*, 79 Va. L. Rev. 1805, 1806 (1993) (saying *Bowers* represents a homophobic ideology); *Lance Liebman, A Tribute to Justice Byron A. White, 107 Harv. L. Rev. 13, 19 (1993) (calling Bowers Justice White's worst opinion). Id.* at fn. 17.

> It is a half-measure to let incurably sick people steadily contaminate the remaining healthy ones. [Good Justice Scalia twisted "contra-majoritarian, pro-minority theory."] *This is in keeping with humanitarianism which, to avoid hurting one individual, lets a hundred others perish.* ["public morality" and a "broad social agenda"] *The demand that defective people be prevented from propagating equally defective offspring is a demand of the clearest reason and if systematically executed represents the most humane act of mankind.* [*See Buck v. Bell*, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).] *It will spare millions of unfortunates undeserved sufferings, and consequently will lead to a rising improvement of health as a whole.* [The health issue, regardless of the facts, always sounds good.] . . .
>
> The struggle against syphilis and the prostitution which prepares the way for it is one of the most gigantic tasks of humanity, gigantic because we are facing, not the solution of a single question, but the elimination of a large number of evils which bring about this plague as a resultant manifestation. *For in this case the sickening of the body is only the consequence of a sickening of the moral, social, and racial instincts.* (Emp. added.) *Infra* at 255-256. *Mein Kampf*, Houghton-Mifflin (1971 Edition).

The true nature of this particular pseudo-moralist and savior of the world from a lack of "public morality" and a "broad social agenda" is best gleaned with the following quote: "*The relation of the Jews to prostitution* and, even more, to the white-slave traffic, could be studied in Vienna as perhaps in no other city of Western Europe, with the possible exception of the southern French ports." *Infra* at 59. Indeed, Adolph Hitler is *exactly* the type of "moral" individual that adult, consensual, sexual warmth, the thrill of human intimacy, and hugs and loves, for hire or for free, is so threatening and terrifying; after all, sex is about keeping the human animal alive.

Another quote of a pseudo-moralist, this time a 19th Century female voice, serves up dire warnings as to failed,

female morality: "The whole thing is an epidemic of vanity and restlessness – a disease as marked as measles or smallpox – hereafter this outbreak will stand in history as an instance of national sickness, of moral decadence, of social disorder." This statement by Eliza Lynn Linton, however, *was not about prostitution*. It was made in March of 1892 *about the women's right to vote*. *Ain't Nobody's Business If You Do*, Peter McWilliams, Prelude Press, 1993, p. 336. (Please note that politically, black men received the right to vote in 1870 but women didn't get to vote until 1920.)

This case is not about establishing prostitution or approval of prostitution on private, moral or immoral grounds. (God and history have already done that.) Nor is it a question of whether you want your daughter to work as a prostitute (although that is *her* adult decision, not her daddy's) but whether you want her to be criminally arrested if *she* does. The Eleventh Circuit Court of Appeals in *Roe II*, *Id.* at 1577, notes from Petitioner's record that there has historically been public opprobrium against prostitution (although seldom has it ever been criminalized). However, there has also been historical public opprobrium held against blacks, the handicapped, Jews, Irishman, lepers,[5] witches, slaves, Hispanics, debtors, women, ex-convicts, ad infinitum, not to mention the abortionist and the poor. And, while referring to the Petitioner's extensive record: " . . . She also refers to ancient Greek history, Roman Mythology, the Bible, *biblical scholars such as St. Thomas Aquinas and St. Augustine*, and the history of the old American West." *Id.* at 1577.

Unfortunately, the Eleventh Circuit Court of Appeals again *myopically* receded into judicial ignorance on sexual matters and the obvious fact that no society has ever existed without prostitution, legal or illegal, and none does today (just look at the Washington, D.C. yellow pages). St. Augustine

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[5] In fact, in the 12th Century in Lyon, France (and Marseilles), no "lepers, Jews, or prostitutes" were permitted to touch the fruit in the market. Petitioner's record [R-4-31-#2 exhibits]. Why is it that Jews and lepers are now protected, but women are still jailed and stigmatized for adult consensual sexuality?

candidly admitted that: "Suppress prostitution and capricious lust will overthrow society." *Whores in History*, Nickie Roberts, HarperCollins (1993), p. 55. And the 13th Century theologian, St. Thomas Aquinas stated: "Prostitution in the towns is like the cesspool in the palace: take away the cesspool and the palace will become an unclean and evil-smelling place." *Id.* at 74. Again, almost every American home, school, church, and corporation is now familiar with *that* stench. If these two Catholic scholars are not saying that prostitution is an essential part of ordered liberty, then what are they saying? And, as further proof, Kenny Rodgers states in the March 15, 1996 History Channel video, *The Real West: Easy Women: Prostitution in the Real West*, that: "*The frontier prostitute took her place as a western icon alongside the noble pioneer and the lonesome cowboy.* Saints or sinners, villains or victims, harlots or heroines, *these women claim a rightful place in history as the first ladies of the American west.*" (Emp. added.) And, back east, there's the brilliantly detailed and footnoted work of Timothy Gilfoyle in *City of Eros: New York City, Prostitution and the Commercialization of Sex, 1790-1920*, Norton Press 1992, which the Eleventh Circuit Court of Appeals also ignored, establishing the overwhelming historical importance and social significance of prostitution in 19th Century New York City at all levels, from immigrants to the Astors and Episcopal ministers. And, the Eleventh Circuit Court entirely ignored the moving, unrefuted affidavit of World War II combat veteran Harold Kennedy. *See* Appendix G. And, the comments of "family values" spokesman, William Bennet:

> *Almost every society has its red-light districts. That is part of reality, and we all understand that.* [except the Eleventh Circuit Court] *A free society can tolerate such districts.* [What does that make Florida and the United States?] But society should also do what it can to discourage them and contain them. [through zoning, not criminalization] And so, too, with the popular culture version of red-light districts. *They ought to remain on the periphery*, away from Main Street, our living rooms, our schoolyards . . .

> We intend to keep making the case that civilization needs cultural guardrails, certain reliable standards of right and wrong that *may not be enforceable in law* but must be enforceable through conscience and consensus. (Emp. added.) [R-6-53-37, fn.22]

The Petitioner also references to this Court the first 7½ minutes of *The Civil War Journal: The Foot Soldier* aired on The History Channel, March 20, 1997. The Army of Tennessee had no choice but to directly license "public women" while Washington, D.C. and Richmond, Virginia became giant red-light districts.

II. The opinion of the Eleventh Circuit Court of Appeals is in direct conflict with and in fact undermines and overrules over 100 years of U.S. Supreme Court bodily and sexual privacy cases extending from *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891) and *Olmstead v. United States*, 277 U.S. 438, 478, 485 S.Ct. 564, 572, 72 L.Ed. 944 (1928); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); through *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and *Cary v. Population Services*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

It is impossible to differentiate the right to choose to have sex for the purpose of bearing or begetting a child, or not (*Griswold, Eisenstadt, Cary, etc., supra*), as a human and civil right (*Skinner, supra*), with whomever you so choose (*Loving, supra*), with complete bodily immunity (*Botsford, supra*) and the right to be left alone in private (*Olmstead, supra*) from the fundamental right to have sex. If the U.S. Supreme Court knows another way to have sex, the Petitioner would be most interested to learn.

Even as far back as 1891, the U.S Supreme Court wrote in *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891) case wrote:

> No right is more sacred, or is more carefully guarded, by the common law, than the *right of every individual to the possession and control of his own person, free from all restraint and interference by others, unless by clear and unquestionable authority of law*. (Emp. added.) *Id.* at 251.
>
> . . .
>
> As well said by Judge Cooley: 'The *right to one's person* may be said to be a *right of complete immunity*': *to be let alone*." *Id.* at 251. (Emp. added). *See also Olmstead v. United States*, 277 U.S. 438, 478, 485 S.Ct. 564, 572, 72 L.Ed. 944 (1928).

The right of "complete immunity" for "one's person" is about as strong as any legal doctrine can be and absolutely, rightfully so. And, even on its face, the Florida prostitution definitional section Chapter 796 challenged by the Petitioner does not meet constitutional muster. By expressly exempting sex for hire between spouses from the criminal definition of prostitution, the equal protection clause is violated as clearly expressed in *Eisenstadt v. Baird*, *supra*, despite the Eleventh Circuit Court of Appeals' misstatment of law in *Roe II*. *Id.* at 1581.

III. There is an irreconcilable conflict between the Eleventh Circuit Court's adherence to *Bowers v. Hardwick*, as strict stare decisis, to both gay and now heterosexual adult consensual sexual activity and all of the U.S. Supreme Court sexual rights and abortion decisions cited *supra* in issues I and II.

The Eleventh Circuit Court's decision extends and elevates *Bowers v. Hardwick*, *supra*, from not only criminalizing tens of millions of gays and lesbians in America (thus giving a legal pretext for "gay bashing," and discrimination against gays), but now applies it to all adult, consensual, heterosexual affairs as well and robs a free people of their own God-given bodies and sexual rights. This criminalizing of the rest of the peace loving, American, adult population is not a comforting

thought and strongly suggest that it is time to overrule *Bowers v. Hardwick* as the unfounded hate case it is.

IV. There is a fundamental, constitutional, human, God-given right to have sex, and the State is not vested with inchoate ownership of the body of its citizens and merely licenses their bodies and sexuality to them at the whim and arbitrary "moral" control and "broad social agendas" of the State.

The Eleventh Circuit Court in *Roe II v. Butterworth* writes:

> *Whether the right of privacy includes the right to engage in extra-marital sexual relations between consenting, heterosexual adults is a much more difficult question and one which the Supreme Court has refused to resolve. See Bowers v. Hardwick*, 478 U.S. at 187 n. 2, 106 S.Ct. at 2842 n. 2; *Eisenstadt v. Baird*, 405 U.S. at 451 n. 8, 92 S.Ct. at 1037 n. 8. The lower courts that have considered this issue have reached different conclusions. (Citations omitted.)
>
> . . . *Nonetheless, a strong argument can be made that the right to personal intimacy and privacy is broad enough to protect from state intrusion or interference the consensual sexual relations of heterosexual adults*. (Emp. added.) *Id.* at 1579.[6]

The Petitioner freely admits that the U.S. Supreme Court has "judicially" chosen not to phrase the fundamental right to have sex in those exact words. But a three legged dog is a three legged dog, even if you call it "Champ." However, if the question is still an open one then it must be answered now for sexual sanity in America. The Eleventh Circuit Court cites

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[6] The Petitioner believes that this Court is well past the old specific enumeration of rights argument. If something as basic as fundamental ownership of one's own sexuality cannot be presumed in the life and liberty clauses of the Fifth and Fourteenth Amendments, then why aren't the right to eat, breathe, walk, sleep and defecate also specifically enumerated?

Ferguson v. Skrupa, 372 U.S. 726, 731-732 (1963), an economic substantive due process case, to destroy the personal fundamental due process right to engage in sex for pay or for free. In *Ferguson*, the U.S. Supreme Court addressed the State prohibition of debt arrangement work by other than skilled licensed attorneys with ethics requirements. The Petitioner wholeheartedly agrees. Sex professionals serve the public interests and society far, far better than amateurs. Nor did the *Ferguson* case ever mention the *fundamental right to work and commerce in lawful activity* as enunciated by the U.S. Supreme Court in *Allegeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897), least of all criticize or discredit it. At no time has the Petitioner suggested that ongoing commerce in adult consensual sexual activities is not subject to rational regulation in matters of zoning, health protection, police, and safety protection, and taxation. *See infra*. Under the Florida Statute, a woman can make love to one million men for "free," but if she takes one dollar on the dresser top for her sexuality, even if unsolicited in private or otherwise, she has now become a criminal. Even a lap dance will earn an arrest.

V. The opinion of the Eleventh Circuit Court of Appeals is in direct, irreconcilable conflict with longstanding rationality and reasonableness requirements for all legislation, at any level and for any purpose.

Independent of Petitioner's fundamental right to have sex for free, or for hire, is the woman's right to hold herself out to the public as providing an ongoing professional service business. The economic regulation of lawful activity is supposed to encourage and promote the legitimate interests of entrepreneurs over unscrupulous competitors in order to protect the public's best interests, not outlaw the lawful activity itself – especially if it is a fundamental right. In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), a titanic gender conflict, the Supreme Court wrote:

This case requires us to address a conflict between a State's efforts to *eliminate gender-based discrimination* against the citizens and the constitutional freedom of association asserted by members of a private organization. *Id.* at 612, 3247, 462.

. . .

In one line of decisions, the Court has concluded that *choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.* (Emp. added.)

. . .

The Court has long recognized that because the Bill of Rights is designed to secure individual liberty, *it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. Id.* at 618, 6249, 462. (Emp. added.)

. . . *Infringements on that right may be justified by regulations* adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. (Emp. added.)

. . .

This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and society, of removing the barriers to economic [equality] advancement and political and social integration that have *historically plagued certain disadvantaged groups, including women. Id.* at 624, 3253, 462. (Emp. added).

In any event if enforcement of the [anti-discriminatory] Act causes some incidental, abridgment of the Jaycee's protected speech, that effect is no greater

than is necessary to accomplish the State's legitimate purposes. Id. at 628, 3255, 462. (Emp. added).

VI. The opinion of the Eleventh Circuit Court of Appeals permitting criminalization of prostitution inherently discriminates against women – as well as the single and unmarried, the handicapped, the mutilated, the ugly, and the elderly.

This Court can certainly write flourished gender anti-discrimination, equal protection cases, *see U.S. v. Virginia, et al.*, 518 U.S. 515; 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). But if it doesn't eliminate male, and State ownership of female sexuality little will change and women will remain sexually dominated.

VII. The Eleventh Circuit Court of Appeals' opinion and findings of fact ignored the Petitioner's unrefuted record and analysis of prostitution establishing the lack of any compelling (or even rational) State interest in criminalizing consensual adult sex for hire, but the legal and factual record do illustrate that the State does have legitimate compelling interests in ongoing commercial prostitution as regards to (i) zoning; (ii) health protection for both the woman and client; (iii) police protection for the woman and client; and (iv) taxation as in any other lawful activity.

The Eleventh Circuit Court's findings of compelling interest for criminalization of sex for hire or compensation are entirely bogus and contrived and not based on any factual record. To summarize, the Petitioner quotes a respected local columnist Robert L. Steinback, *Judge is Wrong to Say State can Outlaw Consensual Sex*, *The Miami Herald*, March 21, 1997, about this *Jane Roe II* case:

> Still, there's an element of hypocrisy in prostitution laws. People routinely exchange sex for dinners, nights at the theater, modeling auditions and vacations in Europe – not always *quid pro quo*, mind you,

but you get the idea – without suspicion of criminality. Why does this exchange become illegal when the currency is cold cash, free of any illusions of a relationship?

Gonzalez [read the Eleventh Circuit Court of Appeals] focused on the potential harm wrought by prostitution – in particular, the harm to marriages (as if only married people pay for sex). *It is reasonable for the Legislature to deduce that prostitution "could lead to greater marital strife than mere adultery," Gonzalez said – though it's not clear to me why engaging a prostitute makes infidelity more onerous.*

Soliciting a prostitute can indeed harm a marriage. But so can staying out late playing pool with the boys (or the girls). Or working as a police officer, paramedic or some other stressful occupation. Or being overly attached to one's mother. We have no laws against these perils.

It might seem reasonable to consider marriage an exalted state of relationship – but government shouldn't criminalize certain behavior on the arbitrary belief that it is anti-marriage.

In any case, had Gonzalez stopped there, his decision wouldn't have raised many eyebrows. The state has the power to regulate commerce, and to determine what commerce might be harmful to its citizens – I just disagree that prostitution is harmful by definition.

Banning roommates?

But the judge went further. In his opinion, *he affirmed the state's power to regulate extramarital sexual behavior between consensual adults even when money is not transacted.*

Gonzalez, clearly on a roll, added that *the state can even outlaw cohabitation* – which involves only the *threat* of consensual sex. Would the judge uphold an anti-roommate law?

> I remain baffled as to how government can claim a right to govern consensual extramarital sex between adults.
>
> *Call it blasphemous if you must, but the singular rationale that the Bible or God deems such acts sinful is not enough to justify enforcement by a secular government – even a secular government that recognizes that we the people are endowed by our Creator with certain inalienable rights.* It's the state's role to outlaw and punish crime – not sin, unless the sin is also criminal.
>
> *There is considerable danger in fusing state power with religious orthodoxy. If our government can regulate consensual sex, how different would we be from the Islamic fundamentalist governments of Iran or Iraq that we in the West fear so much?* (Emp. added.)

The Petitioner believes there are four rational and legitimate compelling interests of the State to civilly regulate the commercial aspects of prostitution as a busines: (i) zoning; (ii) health protection of both prostitute and client; (iii) police protection for the woman and client; and (iv) taxation, as in any other lawful activity. While the issue of prostitution – just like civil rights, abortion, and the rights of the accused, etc. may also be a political question, this fact certainly does not change their status as being unacceptably repugnant and repulsive to the U.S. Constitution and a free people.

VIII. The U.S. Constitution must be treated by this U.S. Supreme Court as a living document capable of supporting constitutional freedom and individual space in the 21st Century or otherwise the U.S. has become an archaic, religious state theocracy in clear violation of the First Amendment requirement of separation of church and state.

The Petitioner does not ask this Honorable U.S. Supreme Court to create any new fundamental rights, but to simply enforce and protect old ones. The present criminalization

ensnares and stigmatizes every healthy, life-loving American, engendering antagonism toward American government, and swelling sexual frustration, violence, harassment, discrimination and abuse will continue to swell. If the Constitution is not treated and inviolately respected as a flexible, protective document growing with America as it makes and remakes itself over and over, time and time again, we are all doomed to enslavement by the religious mysticism of the ancient past, just as we blast off for the start of the next millennium. The Petitioner, JANE ROE II, with heart and soul, respectfully requests and prays to this Honorable U.S. Supreme Court for basic constitutional justice for all Americans. **Freedom** *is* choice and if there is no sexual freedom of choice, then we are all licensed slaves, not a free people.

CONCLUSION

Perhaps one quote from a truly courageous and great American says it all:

> Perhaps the sentiments contained in the following [above-written] pages, are not yet sufficiently fashionable to procure them general favor; a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides.

This lover of freedom's name was Thomas Paine, *Common Sense*, January 1776.

Respectfully submitted,

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APPENDIX A

Jane ROE, II, Plaintiff-Appellant,

v.

Robert BUTTERWORTH, Attorney General of the State of Florida, Defendant-Appellee.

No. 97-4427.

United States Court of Appeals, Eleventh Circuit.

Nov. 24, 1997.

Appeal from the United States District Court for the Southern District of Florida (D.C. Docket No. 94-8681-CIV-JAG); Jose A. Gonzalez, Jr., Judge.

Before COX and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

This suit and appeal involve a challenge to the laws of the state of Florida prohibiting prostitution. The contentions are that such laws violate several provisions of and rights recognized under the United States Constitution. The district court granted summary judgment in favor of the defendant.

We affirm the judgment of the district court for the reasons set forth in its thorough opinion published at 958 F.Supp. 1569 (S.D.Fa.1997).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE ROE II,

Petitioner,

v.

ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Respondent.

CASE NO. 94-8681-CIV-GONZALEZ

FINAL ORDER

(Filed Mar. 1, 1997)

This Cause has come before the Court upon Petitioner's Motion for Summary Judgment, filed on April 16, 1996, and Respondent's Cross-Motion for Summary Judgment, filed on July 19, 1996. Both motion have been fully briefed and are ripe for review. Additionally, the parties agree that no material factual disputes exist in this case, that the issues presented are entirely questions of law, and that the case is ripe for adjudication. Petitioner's Motion for Summary Judgment, at 1; Respondent's Cross-Motion for Summary Judgment and Supporting Memorandum of Law, at 1 (hereinafter "Respondent's Memorandum").

I. PROCEDURAL BACKGROUND AND FACTS

In a simple two page complaint, Petitioner challenges the constitutionality of Chapter 796, Florida Statutes, and seeks declaratory and injunctive relief against Robert Butterworth, acting as Attorney General of the State of.Florida. Petitioner brings her claims under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

Petitioner is a former employee of the "most prestigious and famous escort service in south Florida and the United States. . . . " Petitioner's Affidavit (DE 10), ¶ 4. According to Petitioner, during her employment as a call girl, she "dated and engaged in sexual activity for hire with some of the most powerful and well known businessmen in the United States and the World as well as numerous diverse professionals such as doctors, lawyers, reverends and ministers, professors and even State Circuit Court and Federal Judges," most of whom were married. *Id.*, ¶ 5. Petitioner is interested in returning to her career as a prostitute, but has refrained from doing so at the prompting of her attorney, and out of fear of prosecution. *Id.*, ¶ 13.

Florida defines prostitution as "the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses." Fla.Stat. § 796.07(1)(a). "Sexual activity" is defined as "oral, anal, or vaginal

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[1] Since Petitioner's claim is brought only against the State of Florida through its Attorney General, it is only cognizable pursuant to the Fourteenth Amendment. *See Barron v. City of Baltimore*, 32 U.S. 243 (1833).

penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation. . . . " Fla.Stat. § 796.07(1) (d). Section 796.07 also makes it unlawful for any person to "purchase the services of any person engaged in prostitution." Fla.Stat. § 796(2) (h) (i). Violation of Section 796.07 constitutes the commission of a misdemeanor. Fla.Stat. § 796.07(4). The remainder of Chapter 796 deals with other offenses that are related to prostitution.

In her Complaint, Petitioner alleges that sections 796.02 through 796.08 "to the extent they prohibit and make criminal prostitution and acts related thereto criminal, are unconstitutional because they directly violate the Petitioner's Fifth and Fourteenth Amendment rights to due process and equal protection and her fundamental right of privacy, and pursuant to that right[, the right] to control her own reproductive organs whether in a private or commercial transaction." Petitioner's Complaint, ¶¶ 2, 7. Following this Court's denial of Respondent's Motion to Dismiss, and subsequent Motion for Reconsideration, Petitioner filed its Motion for Summary Judgment. Respondent responded with its Cross-Motion for Summary Judgment shortly thereafter.

II. LEGAL STANDARD FOR CONSIDERING A MOTION FOR SUMMARY JUDGMENT

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).[2] If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson*, 477 U.S. 242, 249-50.

III. IS PETITIONER'S CLAIM JUSTICIABLE?

Before this Court may address the constitutional issues raised by Petitioner, it must determine whether a sufficient case or controversy exists to satisfy Article III, § 2 of the United States Constitution, and whether Petitioner has standing to challenge the enforcement of Fla. Stat. § 769.07 (1995).[3] A federal court may only "adjudge

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[2] The standard for granting summary judgment mirrors the standard for directing a verdict under Fed.R.Civ.P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986).

[3] The justiciability concepts of "standing" and "ripeness" are interrelated; both are aimed at insuring that the court is presented only with concrete disputes. *Wilderness Society v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996); *Doe v. Dulling*, 782 F.2d 1202, 1206 n.2 (4th Cir. 1986); John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, § 2.12, at 68-91 (5th ed. 1995). Thus, both require a showing of actual or threatened injury. *Wilderness Society*, at 390; *Doe*, at 1206 n.2. "When determining standing, a court asks whether these persons are the proper parties to bring

the legal rights of litigants in actual controversies." *Baker v. Carr*, 369 U.S. 186, 204 (1962). "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42 (1971). As stated by the Supreme Court:

> The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945); *see Evers v. Dwyer*, 358 U.S. 202, 203, 79 S.Ct. 178, 179, 3 L.Ed.2d 222 (1958); *Maryland Casualty Co. v. Pacific Coal & Oil Co., supra*.

Babbitt v. Farm Workers Nat'l Union, 442 U.S. 289, 297-98 (1979).

Petitioner has not been prosecuted, nor is she in immediate threat of prosecution for violating the statute she challenges. However, "it is not necessary that petitioner first expose [herself] to actual arrest or prosecution

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the suit, thus focusing on the qualitative sufficiency of the injury and whether the complainant has personally suffered the harm. *See* Erwin Chemerinsky, Federal Jurisdiction § 2.4.1 (1989). When determining ripeness, a court asks whether this is the correct time for the complainant to bring the action." *Wilderness Society*, at 390.

to be entitled to challenge a statute that [s]he claims deters the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), citing *Epperson v. Arkansas*, 393 U.S. 97 (1968). Instead, she may maintain an action so long as she has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder. . . ." *Athens Lumber Co., Inc. v. Federal Election Commission*, 689 F.2d 1006 (11th Cir.1982) (citations omitted), *aff'd on reh'g*, 718 F.2d 363 (1983), *cert. denied*, 465 U.S. 1092 (1984).

In this case, Petitioner alleges that she desires to engage in conduct prohibited by § 769.07, and that she currently refrains from doing so out of fear of prosecution. Respondent has indicated that it will continue to enforce the challenged ordinance. Thus, Petitioner is being forced to chose between complying with § 769.07 and suffering economic injury, or facing the risk of prosecution. *See American Booksellers Association, Inc. v. Virginia*, 792 F.2d 1261, 1264 (4th Cir. 1986), *superseded*, 802 F.2d 691 (4th Cir. 1986). In this posture, Petitioner's injury and fear of prosecution is more than "chimeral," *Poe v. Ullman*, 367 U.S. 497, 508 (1961), and satisfies the Constitution's requirement that she have "such a personal stake in the outcome of the controversy to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker*, 369 U.S. at 204. Petitioner has shown the existence of a "threatened injury as a result of the putatively illegal conduct of the

defendant" which can "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976); *GTE Directories Publishing Corp. v. Trimen America, Inc.*, 67 F.3d 1563, 1567 (11th Cir. 1995). Therefore, the Court concludes both that an actual controversy exits in this case, and that Petitioner has standing to bring the present action. *Accord Doe v. Gonzalez*, 723 F. Supp. 690, (S.D.Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989).

IV. DOES THE FUNDAMENTAL RIGHT TO PRIVACY COVER PROSTITUTION?

As an initial matter, the Court must determine the proper standard for reviewing Petitioner's claims. If, as Petitioner asserts, the conduct in which she wishes to engage falls within the zone of privacy protected by the Fifth and Fourteenth Amendments to the United States Constitution, the Court must engage in a two part analysis. Initially, the Court must determine whether the challenged legislation burdens the exercise of Petitioner's right of privacy. If the Court answers this question in the affirmative, it must strictly scrutinize the legislation to determine if it is narrowly tailored to achieve a compelling state interest. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.

520, 546 (1993). If the Court concludes that the activity in which Petitioner seeks to engage does not fall within the ambit of her fundamental right of privacy, or that the legislation does not burden any fundamental right, the Court must determine whether the statute is rationally related to a legitimate governmental interest. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Tarter v. James*, 667 F.2d 964, 969 (11th Cir. 1982); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.3 (5th ed. 1995).

Even before it determines what level of review to apply, however, the Court must identify the exact nature of the right Petitioner asserts. In large part, the Court's conclusion will turn upon the level of specificity with which it views Petitioner's claim; the Court must determine whether to view Petitioner's claim at a very general level – as a unitary whole – or at a more specific level. In other words, is the issue in this case whether Petitioner has a constitutional right to engage in prostitution? Or should that activity be broken down into its constituent parts?

Frequently, as a claim is viewed more generally, its nature becomes more consistent with a fundamental right. This problem was recognized by Justice Scalia in *Michael H. v. Gerald D.*, when he wrote:

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice BRENNAN would choose to focus instead upon

> "parenthood." Why should the relevant category not be even more general – perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.

491 U.S. 110, 126 n.6 (1989). *See also, Id.*, at 137-38 (Brennan, J., dissenting).

Justice Scalia's formulation was not adopted by the majority of the Court in *Gerald D.*, and was later rejected in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992). Yet there remains a strong precedent in favor of selecting the most specific level of tradition possible for adjudicating this case – *Bowers v. Hardwick*, 478 U.S. 186 (1986).

In *Bowers*, the Court rejected Hardwick's challenge to Georgia's anti-sodomy law. Hardwick, who had been arrested for committing an act of sodomy with another adult male in the privacy of his own bedroom, argued that the statute violated his constitutional right to privacy. *Id.*, at 187. In his dissent, Justice Blackmun argued that Hardwick's claim should be viewed at a very general level as " 'the right to be let alone.' " *Id.*, at 199, quoting

Olmstead v. United States, 277 U.S. 438, 478, (1928) (Brandeis, J., dissenting). The Court, however, rejected Justice Blackmun's formulation, and instead framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . . " *Id.*, at 190. Thus, the Court viewed Hardwick's claim at a very specific level, taking into consideration all of the relevant facts of which the State complained. Thus, it is clear that the Court does not inevitably limit its inquiry to general, overriding principles of privacy.

Initially, Petitioner presented her claim as a coherent activity. Later, perhaps in response to this Court's recognition that Petitioner's claim could be based upon "some smaller subset of personal rights," she directed greater attention to this alternative theory. Petitioner has, however, included arguments supporting each approach in her memoranda. Because the Court believes that it would be helpful to explore both of Petitioner's approaches, it will consider each in turn.

A. What constitutes a fundamental right?

It is never easy for a court to determine whether a particular activity, previously unaddressed by the Supreme Court, falls within one of the "unenumerated rights" created by the Constitution. Some restrictions on the state were made unmistakably clear by the framers. *See* United States Constitution, Art. I, § 10. As for other restrictions upon state legislation, the Constitution has at times appeared miserly, only begrudgingly revealing her mysteries.

The unenumerated rights upon which the states are forbidden from intruding are most often found as stemming from the Due Process Clauses of the Fourteenth Amendment. *But see Griswold v. Connecticut, supra.* The confusion over the scope of rights protected by the imprecise language of this provision has caused more than a few disagreements in the Supreme Court over the years. *See Lochner v. New York,* 198 U.S. 45 (1905); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937); *Olsen v. State of Nebraska ex rel. Western Ref. & Bond Ass'n,* 313 U.S. 236 (1941); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525 (1949); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949); *Adamson v. California,* 332 U.S. 46, 68-92 (1947) (Black, J., dissenting); *Michael H. v. Gerald D.,* 491 U.S. at 126 n.6 (Scalia, J.). Read literally, the Due Process Clause seems to be a procedural provision, merely limiting the manner in which a state may deprive a person of "life, liberty, or property". For at least 109 years, however, "the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.' " *Daniels v. Williams,* 474 U.S. 327, 331 (1986), *quoted in Planned Parenthood v. Casey,* 505 U.S. at 846, citing *Mugler v. Kansas,* 123 U.S. 623, 660-661 (1887). The due process clause of the Fourteenth Amendment "affords not only a procedural guarantee against deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Kelley v. Johnson,* 425 U.S. 238, 244 (1976).

In evaluating Petitioner's claim, the Court must ask whether the liberty she asserts is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.), *quoted in, Michael H. v. Gerald D.*, 491 U.S. at 122. Only if the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " will it be deemed fundamental. *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932), *quoted in Griswold v. Connecticut*, 381 U.S. at 493 (Goldberg, J., concurring). In determining whether a right is so "implicit in the concept of ordered liberty" as to warrant constitutional protection, the Court should refer to this Nation's history, and basic underlying values. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Griswold v. Connecticut*, at 501 (Harlan, J., concurring); *Roe v. Wade*, 410 U.S. 113, 152 (1973). Also, the Court must maintain a "wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Id.* After referring to these sources of guidance, a fundamental right will only be found if the Court concludes that the liberty asserted is of such importance that "neither liberty nor justice would exist if [it] were sacrificed." *Palko v. Connecticut*, 302 U.S. at 326. As stated by Justice Harlan:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of

> the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. at 542-43, (Harlan, J., dissenting), *quoted in Planned Parenthood v. Casey*, 505 U.S. at 849-50.

At issue in this case is the Due Process Clause's substantive guarantee of liberty, which has been interpreted as including a right of privacy protecting "the personal intimacies of the home, the family, marriage, motherhood, procreation, . . . child rearing", and education. *Paris Adult Theatre I v. Salton*, 413 U.S. 49, 65 (1973).[4] These protected intimacies were, for a long time, limited to the marital relationship. *See e.g., Skinner v. Oklahoma*, 316 U.S. at 541 (1942); *Griswold v. Connecticut*, 381 U.S. at 486, 495. The Court's opinion in *Eisenstadt v. Baird*, however, made clear that this right "to be let alone" means more: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. at 453, citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

Recognizing that the interpretation of the Due Process Clause is not a precise science, the Supreme Court has admonished lower courts to exercise extreme caution before extending that Clause's reach. Such circumspection is dictated by the nature of the government the

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[4] *See e.g. Pierce v. Society of Sisters*, 268 U.S. 510, (1925) (child rearing and education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (same); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

Constitution established. Under our representative democracy, courts must be particularly careful to leave important political decisions in the hands of the majority. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 100-01 (1980). Thus, the Court has warned:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, 478 U.S. at 194-195; *see also Michael H. v. Victoria D.*, 491 U.S. at 121-22; *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting). Bearing this warning in mind, the Court shall now consider Petitioner's claims.[5]

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[5] Unfortunately, it is difficult to ascertain the precise nature of many of the arguments advanced by Petitioner. Additionally, the relevance of many of the exhibits submitted by Petitioner is so attenuated that they serve little purpose. When a party fails to carefully define the legal issues in her case, and fails to marshal relevant facts in support of her claims, it exacerbates

B. Does Petitioner have a fundamental right to engage in prostitution?

Petitioner argues that prostitution is so well established in the traditions and history of this society as to come within the protection of Due Process Clause's guarantee of privacy. Her supporting references to "evidence" reach back millions of years to the development of Homo Erectus. She also refers to ancient Greek history, Roman Mythology, the Bible, biblical scholars such as St. Thomas Aquinas and St. Augustine, and the history of the old American West. Petitioner has submitted ample evidence to establish that prostitution has an extensive and lengthy history; this is no surprise. Yet she has utterly failed to show either that the act of engaging in prostitution is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed," or that it is so "deeply rooted in this Nations's history and tradition" as to be deemed fundamental. *Palko, Moore, supra.* Indeed, such an argument "is, at best, facetious." *Bowers v. Hardwick,* 478 U.S. at 194.

Longevity alone does not bring an activity within the protection of the Constitution. If it did, every activity that has long been denounced by civilized societies – and they are myriad – would gain constitutional protection from state interference. Murder, robbery, extortion, bigamy, incest, theft, and many other crimes have been committed

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the Court's already difficult task of analyzing complex constitutional claims. In legal memoranda, perhaps more than anywhere else, one should stick to the well worn precept: "quality, not quantity."

since before histories were recorded. Yet, because societies considered them destructive, immoral, indecent, or generally evil, they have all been prohibited at one time or another. The same is undoubtley true of prostitution.

Petitioner does not contest the long standing history of state and criminal laws prohibiting prostitution in this country. Today, every state in the Union, as well as the federal government, has some form of penal statute prohibiting prostitution. Such a well established history of prohibition strongly supports the conclusion that this society has not traditionally valued the practice of prostitution.

Petitioner's references to the Bible are also completely unavailing. The Bible is replete with negative references to "harlots," "prostitutes" and "whores," both in the Old and New Testament.[6] The mere fact that

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[6] *See e.g.*, 1 Cor:6:15 ("Know ye not that your bodies are the members of Christ? Shall I then take the members of Christ, and make them the members of an harlot? God forbid."); Gen:38:24 ("And it came to pass about three months after that, that it was told to Judah, saying, Tamar thy daughter in law hath played the harlot; and also, behold, she is with child by whoredom. And Judah said, Bring her forth, and let her be burnt."); Prov:7:10 ("Whoso loveth wisdom rejoiceth his father: but he that keepeth company with harlots spendeth his substance."); Lev:19:29 ("Do not prostitute thy daughter, to cause her to be a whore; lest the land fall to whoredom, and the land become full of wickedness); Lev:21:9 ("And the daughter of any priest, if she profane herself by playing the whore, she profaneth her father: she shall be burnt with fire."); Deut:22:21 ("Then they shall bring out the damsel to the door of her father's house, and the men of her city shall stone her with stones that she die: because she hath wroght [sic] folly in Israel, to play the whore in her

"harlots" may not have been "systematically repressed," or that particular prostitutes, such as Rehab, were even revered, falls far short of establishing that the the [sic] institution of prostitution is "implicit in the concept of ordered liberty." *See* Petitioner's Brief, at 84.

Petitioner's own exhibits demonstrate the public opprobrium that has been leveled towards prostitution throughout history. Indeed, the main thrust of Petitioner's argument is that such malevolent judgments, so common throughout history, stem from antiquated and hypocritical attitudes and ethics. While such an argument shows that societal norms do not mesh with Petitioner's liberalized ideals, it does nothing to advance her claim that the right to engage in prostitution is constitutionally protected.

Petitioner's reliance on the privacy of the home or other closed quarters also fails to persuade this Court that prostitution is constitutionally protected. While

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father's house: so shalt thou put evil away from among you."); Deut:23:17 ("There shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel."); Deut:23:18 ("Thou shalt not bring the hire of a whore, or the price of a dog, into the house of the LORD thy God for any vow: for even both these are abomination unto the LORD thy God."); Prov:23:27 ("For a whore is a deep ditch; and a strange woman a narrow pit."); Jer:3:2 (" . . . thou has polluted the land with thy whoredoms and with thy wickedness."); Jer12:27 ("I have seen thine adulteries, and thy neighings, they lewdness of thy whoredom, and thine abominations on the hills in the fields. Woe unto thee, 0 Jerusalem! Wilt thou not be made clean?"); Ezek:16:26 ("Thou hast also committed fornication with the Egyptians thy neighbors, great of flesh; and hast increased thy whoredoms, to provoke me to anger.").

the Supreme Court has given a more expansive reading to the right of privacy when a challenged ordinance seeks to reach within an individual's home, *see Stanley v. Georgia*, 394 U.S. 557 (1969), the Court has also made clear that the privacy of one's home does not render an individual immune from prosecution. *Bowers v. Hardwick*, 478 U.S. at 193.[7] Even "[v]ictimless crimes . . . do not escape the law where they are committed at home." *Id.; See also, Employment Div., Dept. Of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) (recognizing the state's legitimate interest in preventing the use of illegal drugs even in the home).

Other Supreme Court cases give further support for rejecting Petitioner's claim. Various Justices of the Supreme Court, both in separate opinions and on behalf of the Court, have stated that the states may appropriately criminalize prostitution. *See e.g. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 594 (1991) (White, J., dissenting) ("the State clearly has the authority to criminalize prostitution and obscene behavior"); *Id.*, 501 U.S. at 575 (Scalia, J., concurring); *Id.*, 501 U.S. at 584 (Souter, J., concurring); *Paris Adult Theatre I v. Salton*, 413 U.S. 49, 68 n.15 (1973) ("The state statute books are replete with constitutionally unchallenged laws against prostitution, . . . although [this] crime[] may only directly involve 'consenting adults.' "); *Hoke v. United States*, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the

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[7] Petitioner stringently argues that this Court should abandon *Bowers*. That case, however, has never been overruled, and unless and until it is, it remains binding on this Court. The intimation that this Court could overrule a valid Supreme Court case is preposterous.

states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime."). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); *United States v. Bitty*, 208 U.S. 393, 401 (1908); *Caminetti v. United States*, 242 U.S. 470 (1917).

Various justices have also expressed the view that other extra-marital sexual crimes are valid and enforceable. *See Carey v. Population Services, Int'l*, 431 U.S. 678, 702 (1977) (White, J., concurring) ("I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations."); *Paris Adult Theatre I*, 413 U.S. at 68 n.15 ("Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision."); *Griswold v. Connecticut*, 381 U.S. at 498 (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."); *Id.*, at 505 (White, J., concurring) ("the State's policy against all forms of promiscuous or illicit sexual relationships . . . [is] concededly a permissible and legitimate legislative goal."); *Poe v. Ullman*, 367 U.S. at 552 (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."), *quoted in* Catherine D. Perry, "Right of Privacy Challenges to Prostitution Statutes," 58 Wash.U.Law.Quarterly 439, 456 n.120. Even Justice Blackmun, dissenting in *Bowers v. Hardwick*, suggested that the a [sic] state could legitimately enforce such laws. 478 U.S. at 209 n.4.

Petitioner has utterly failed to show that this society has ever recognized a right to engage in prostitution; instead, she has painted a picture of consistent and long standing denunciation. While she has shown that the roots of prostitution reach well back into ancient history, she has failed to shown that "neither liberty nor justice would exist if [it] were sacrificed." Therefore, following the reasoning and analysis of the Supreme Court in *Bowers v. Hardwick*, the Court concludes that Petitioner has failed to show that the right of privacy, as delineated by the Supreme Court, includes the right to engage in prostitution.

C. Is engaging in sex a fundamental right?

Whether the right of privacy includes the right to engage in extra-marital sexual relations between consenting, heterosexual adults is a much more difficult question, and one which the Supreme Court has refused to resolve. *See Bowers v. Hardwick*, 478 U.S. at 187 n.2; *Eisenstadt v. Baird*, 405 U.S. at 451 n.8. The lower courts that have considered this issue have reached different conclusions. *See J.B.K., Inc. v. Caron*, 600 F.2d 710, 711 (8th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980); *Doe v. Duling*, 603 F. Supp. 960 (E.D.Va. 1985), *vacated on jurisdictional grounds*, 782 F.2d 1202 (4th Cir. 1986); *Baker v. Wade*, 553 F.Supp. 1121 (N.D.Tex 1982), *rev'd* 769 F.2d 289 (5th Cir. 1985), *reh'g denied* 774 F.2d 1285 (5th Cir. 1985); *cert. denied*, 478 U.S. 1022 (1986); *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D.Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

Petitioner states unequivocally that "[t]he United States Supreme Court has repeatedly, without fail, ruled that the right to have sex is a fundamental constitutional right independent of *Roe v. Wade* and *Casey.*" Petitioner's Brief, at 12. This conclusion, however, is not supported by even the most strained reading of the cases Petitioner cites. In fact, as pointed out above, several of those cases contain statements suggesting that the Supreme Court would uphold the constitutionality of adultery and fornication statutes. Nonetheless, a strong argument can be made that the right to personal intimacy and privacy is broad enough to protect from state intrusion or interference the consensual sexual relations of heterosexual adults. Fortunately, the Court need not consider that argument at this time, for even assuming the existence of such a fundamental right, Petitioner's challenge to Florida's prostitution statute fails.

As a general matter, when a state law abridges a fundamental personal liberty "the State may prevail only upon showing a subordinating interest which is compelling." *Griswold v. Connecticut*, 381 U.S. at 497 (Goldberg, J., concurring)(citations omitted). This strict level of review, however, is not triggered automatically. Obviously, "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. at 873. Only where a state law "imposes an undue burden" on the exercise of a fundamental right "does the power of the State reach into the heart of the liberty interest protected by the Due Process Clause." *Id.*, at 2819 (citations omitted). If a state law has only incidental effects upon the exercise of a fundamental right, a court will not review that law at the

strictest level of scrutiny. *Id.*, at 2791. Instead, the state need only show that the statute is rationally related to a legitimate state purpose.

Petitioner has not show [sic] that the challenged statute has placed a "substantial obstacle in the path" of her decision to engage in consensual sexual activities, nor has she raised such a claim on behalf of another.[8] *Id.*, at 2820. Chapter 769 of the Florida Statutes simply does not prevent Petitioner from engaging in sex.[9] On the contrary, Petitioner apparently has so little trouble obtaining willing partners for sexual intercourse that they are willing to pay her for the privilege. Thus, Petitioner has not shown even a marginal infringement of the claimed fundamental right.[10]

Petitioner's true complaint is that she is forbidden from profiting financially from engaging in sex. In essence, she argues that "[t]he right to purchase and sell labor is part of the liberty protected by [the Fourteenth]

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[8] It is doubtful that Petitioner has standing to raise such a claim. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

[9] At least one other Court has reached a similar conclusion. *See Cherry v. Koch*, 491 N.Y.S.2d 934, 943 (N.Y.Sup.Ct. 1985), *aff'd as modified*, 514 N.Y.S.2d 30, and *appeal denied*, 512.N.E.2d 552.

[10] This case differs greatly from the abortion and contraception cases in that, unlike here, the exercise of the right asserted in those cases depends upon the purchase of the services or products of another. The vast majority of Americans never purchase sex. The right asserted in this case is more analogous to the fundamental rights to marry and raise children; one could hardly imagine a penal law prohibiting the purchase of a spouse or child being declared unconstitutional. *See* Fla.Stat. § 63.212 (1995) (prohibiting sale of child).

[A]mendment." *Lochner v. New York*, 198 U.S. 45, 53 (1905). Viewed in this light, Petitioner's claim fits neatly within the economic due process line of cases announced by the Supreme Court during the early part of this century. *See Id; Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923). Obviously, it is beyond the power of this Court to breathe new life into these long discredited cases. *See Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963).

As the law stands today, "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). If the means selected "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*" *Id.*, at 537. It is not the function of a court to sit as a superlegislature judging the "wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Following the dictate of these cases, the Court is bound to give great deference to the State's economic regulations, and presume the existence of facts supporting the legislature's judgment. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Thus, the Court's inquiry is "restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support" for the challenged statute.

United States v. Carolene Products Co., 304 U.S. 144, 154 (1938), *quoted in*, Nowak & Rotunda, *supra*, at 386.[11]

The dictate of these cases is clear: this Court shall not second guess the collective decision of the citizens of Florida to prohibit the sale or purchase of sexual services. So long as any reasonable basis for this prohibition can be advanced or even hypothesized, the law must be declared valid. In summary, the Court holds that: (1) there is no constitutionally protected right to engage in prostitution; and (2) even assuming that the fundamental right of privacy includes consensual heterosexual sexual relations between adults, Petitioner has failed to show that Chapter 796 of the Florida Statutes interferes with that right.

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[11] Petitioner argues that there is no precedent for criminalizing a legal act merely because it is performed for consideration. Respondent, however, has pointed to two – the sale of children and the sale of organs. Respondent's Memorandum at 26, citing Fla.Stat. §§ 873.01 and 63.212. Petitioner makes a feeble effort to distinguish the latter example, stating that "we are merely talking about assets of an estate, not fundamental constitutional rights or liberty interests." Petitioner's Reply at 54. Yet the Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty, *or property*, without due process of law. . . . United States Const., 14th Amend, § 1 (emphasis added). Petitioner seems to believe that the framers of the Constitution somehow intended to provide less protection for property rights than they did for liberty interests. This may be Petitioner's personal preference, but it is not supported by the text of the Constitution.

V. THE LAW AS APPLIED TO THIS CASE

Petitioner has raised both a due process and equal protection challenge to Florida Statutes Chapter 796. The latter challenge is based upon the fact that Fla.Stat. § 796.07(1) (a) excludes married couples from its reach. Petitioner also seems to argue that the entire statutory scheme impermissibly discriminates against women. Having already determined that no fundamental right is denied by Chapter 796, the Court must determine whether Petitioner is a member of a suspect class, or otherwise entitled to a heightened degree of review under the equal protection clause. If she is not, the Court will evaluate both Petitioner's Due Process and Equal Protection claims under the rational basis test. *Bowers v. Hardwick*, 478 U.S. at 193; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Tarter v. James*, 667 F.2d 964, 969 (11th Cir. 1982); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.3.

On its face, Chapter 796 applies equally to males and females, and is not facially discriminatory. Thus, in order to prevail on her claim, Petitioner must show that the statute is applied in a discriminatory manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Additionally, Petitioner must prove that any disproportionate application of the law or impermissible classification was intentional. *Washington v. Davis*, 426 U.S. 229 (1976).

The intent requirement is not satisfied even if the legislature was aware that the enactment of the challenged statute would result in discrimination. Discriminatory intent requires more than a mere "awareness of consequences." *Personnel Administrator of Massachusetts v.*

Feeney, 442 U.S. 256, 279 (1979). Instead, " '[d]iscriminatory purpose' implies that the decision-maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* Even if Petitioner shows that discriminatory intent was one of the State's motivating factors, the State may still "rebut the presumption of unconstitutional action" by showing that the discriminatory purpose did not cause the disparate impact, or by showing that the State would have reached the same result regardless of the discriminatory purpose. *Washington v. Davis*, at 239-41; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977).

Petitioner has provided no evidence either in the form of statistics or otherwise, supporting the conclusion that discrimination was a motivating factor behind either the passage or application of Florida Statutes Chapter 796. She has provided voluminous exhibits in an effort to establish that prostitution statutes have a discriminatory impact on women, and are based on outmoded, patriarchal, and chauvinistic beliefs; but she has failed to prove the direct intent to discriminate against women. Because Petitioner has failed to show either the violation of a fundamental right, or the presence of intentional discrimination in this case, the Court must determine whether the challenged statute is rationally related to a legitimate state purpose. *McGowan v. Maryland*, 366 U.S. 420 (1961).

Of course, were Petitioner able to prove that Chapter 796 of the Florida Statutes was enacted *merely* to discriminate against women - to impose male domination, to

demean or degrade women, or to discriminatorily "protect" women in a paternalistic manner, as Petitioner argues – she would be successful in her claim. *See Romer v. Evans*, 116 S.Ct. 1620 (1996). Petitioner, however, has utterly failed to establish that this is the case, and there are far too many logical explanations behind the passage of that statute to take her assertions seriously.

Petitioner claims that Chapter 769 violates the equal protection clause by treating married and unmarried couples unequally. The Florida Legislature, however, is free to treat dissimilarly situated people differently. As stated by the Supreme Court:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. State of Texas*, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222.

Williamson v. Lee Optical Co., 348 U.S. at 489.

Under the rational basis test, the Court will only overturn a statute when "the varying treatment of different . . . persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979), *quoted in*

Price v. Tanner, 855 F.2d 820, 823 (11th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989). Additionally, "the burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary." *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 989 (1972), *quoted in*, *Kite v. Marshall*, 661 F.2d 1027, 1030 (5th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). Finally, "[a] classification having some reasonable basis does not offend [the Equal Protection Clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Instead, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Id.*

Applying this standard, the Court finds that the challenged statute is rationally related to a number of legitimate governmental interests. First, Respondent has a particularly strong interest in protecting the sanctity and strength of family and marital relationships. The Constitution "protects the sanctity of the family [and marriage] precisely because institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), *quoted in Michael H. v. Gerald D.*, 491 U.S. at 124. This special constitutional protection provides a strong justification for the State's decision to exclude married couples from the effects of the challenged statute. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. at 485-86; *see also, Cherry*, 491 N.Y.S.2d at 945. It also justifies the criminal

prohibition against prostitution, as most patrons of prostitutes are married men. J. James, J. Withers, M. Haft, S. Theiss & M. Owen, *The Politics of Prostitution* at 49 (2d ed. 1977), *cited in* Perry, "Right of Privacy Challenges to Prostitution Statutes," at 469 n.222. Petitioner herself has admitted that most of her customers were married. Petitioner's Affidavit (DE 10), ¶ 5. It is unquestionable that a spouse's relationship with a prostitute would have a disastrous effect on most marriages, and it is reasonable for the legislature to conclude that such an affair would lead to greater marital strife than mere adultery. Thus, the challenged provisions are reasonably related to the legitimate government purpose of protecting the institutions of marriage and the family. The state also has a "substantial," if not compelling interest in protecting the morals of its citizens. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). Such a function lies at the very foundation of the "social contract" underlying all civilized democracies. The Supreme Court has recognized the States, legitimate interest in protecting the "social interest in order and morality," *Roth v. United States*, 354 U.S. 476, 485 (1957), and has supported "the right of the Nation and of the States to maintain a decent society. . . . " *Paris Adult Theatre I v. Salton*, 413 U.S. 59-60.

"This Nation's laws are constantly based on notions of morality," *Bowers v. Hardwick*, 478 U.S. at 196; such laws are crucial to a stable and conscientious society. Because every individual's concept of morality may differ, the only legitimate basis for imposing a particular set of mores upon a population is democratic concensus; and the only limitation our Constitution places on this rule of the majority is to insure that such laws are applied to all

with an even hand, and that certain fundamental rights are not infringed. Petitioner, however, would have this Court follow a different course by allowing her to impose her mores - which are shared by a diminutive minority upon the majority. This the Court cannot do, for while our Constitutional system may be "counter-majoritarian" in certain instances, it is not "pro-minoritarian." As stated by Justice Scalia in his concurring opinion in *Barnes v. Glen Theatre, Inc.*:

> there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal much less for thinking that it was written into the Constitution. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." *See Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). *See also Paris Adult Theatre I v. Slaton*,

413 U.S. 49, 68, n. 15, 93 S.Ct. 2628, 2641, n.15, 37 L.Ed.2d 446 (1973); *Dronenburg v. Zech*, 239 U.S.App.D.C. 229, 238, and n.6, 741 F.2d 1388, 1397, and n.6 (1984) (opinion of Bork, J.).

501 U.S. at 574-75.

Similarly in this case, it is reasonable to believe that the majority of citizens of the State of Florida condemn the act of prostitution as "immoral and unacceptable," and it is not this Court's place to tell them that they are wrong. While this moral judgment obviously will offend and aggravate a few, including Petitioner, it does not implicate the Fourteenth Amendment. The dictate of the Constitution is clear: "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts." *Williamson v. Lee Optical Co.*, 348 U.S. at 465.

Numerous other legitimate interests support the legislation at issue in this case, including: crime prevention;[12] protection of public health and welfare; protection of juveniles; and protection of the character of the State's communities.[13]

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[12] *See Schall v. Martin*, 467 U.S. 253 (1984); *Paris Adult Theatre I*, at 58; *Barnes*, at 583-84 (Souter, J., concurring) (citing cases).

[13] *See Paris Adult Theatre I*, at 58 (noting "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."). Petitioner states that "strip clubs have been very successful and quietly zoned in midgrade commercial zoning for years without any tarnish to the community." Petitioner's Brief, at 57. Petitioner's argument evokes the picture of Norman Rockwell's famous painting of Stockbridge Massachusetts, its quaint homes and shops covered

Petitioner's arguments stridently attacking the prudence of Florida's prostitution statute simply are insufficient to overcome her burden in this case, and are more suitable for consideration by the Legislature. This Court will not engage in an extensive, probing, analysis into the logic underlying the Legislature's decision to enact the challenged prohibition. Instead,

> the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and
>
> that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

Tyson & Brother United Theater Ticket Offices v. Banton, 273 U.S. 418, 446 (1927) (Homes [sic], J., joined by Brandeis, J., dissenting), *quoted in, Paris Adult Theatre I*, 413 U.S. at 68 (1973).

It has long been the position of the Supreme Court that so long as a legislative act does not run afoul of a specific constitutional prohibition, a court should not second guess the wisdom of the act. *See e.g., Paris Adult Theatre I*, at 57; *McLaughlin v. State of Florida*, 379 U.S. 184, 196 (1964) (noting that while provisions banning premarital sexual relations and adultery may be legitimately

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in quiet drifts of snow, and standing in perpetual indignation next to the glitzy "XXX Pornacopia!" Can anyone doubt the "tarnishing" effect of such an addition?

applied to all citizens, particular racial groups may not be singled out for punishment). It is because "judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation,' " that it is appropriate for the courts to leave such decisions to the legislatures. *Jacobellis v. State of Ohio*, 378 U.S. 184, 188 n.3 (1964), citing, Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn.L.Rev. 5, 116 (1960).

In an effort to inject some life into the merits of her argument, Petitioner attempts to metamorphosize the State into some evil spirited Orwellian behemoth bent on the destruction of women's rights. Yet her argument belies a basic misunderstanding of the social contract which forms the basis of our government. In our constitutional system, states do not exist as independent entities unaccountable to those whom they govern. Instead, they are communal bodies, through which their constituent members express their common will. It is the very essence of our democratic republic that citizens can influence and direct the political process by casting ballots. Thus, if any law is "a direct and arrogant slap in the face to all women and men in Florida," it is a slap inflicted by those men and women upon themselves. When citizens become unhappy with their government, it is incumbent upon them to make their will known to their representatives.

As noted by the Fourth Circuit Court of Appeals, "[t]he constitution delegates to the legislative and executive branches, not to the federal courts, the establishment of broad social agendas and the expression of ideals of public morality." *Doe v. Dulling*, 782 F.2d at 1207, citing

Valley Forge Christian College, 454 U.S. at 475; *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). No fundamental right is at issue in this case, and Petitioner has failed to show that the challenged statute violates the Equal Protection Clause. Thus, if Chapter 796 is to change, it must be at the hands of the majority.

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED as follows:

1. Petitioner's Motion for Summary Judgment be and the same is hereby DENIED;

2. Respondent's Motion for Summary Judgment be and the same is hereby GRANTED in its entirety, and judgment is hereby entered on behalf of Respondent Robert Butterworth, Attorney General of the State of Florida, and against Petitioner, Jane Roe II.

3. This case is CLOSED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 10th day of March, 1997.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES
DISTRICT JUDGE

cc: Counsel

APPENDIX C

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO.
94-8681

JANE ROE II,

Petitioners,

vs.

ROBERT BUTTERWORTH,
Attorney General of the State
of Florida,

Respondent.
_____/

PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION

(Filed Nov. 29, 1994)

1. This is an action for declaratory judgment and injunction brought by the Petitioner, JANE ROE II, against the Respondent, ROBERT BUTTERWORTH, in his official capacity as Attorney General of the State of Florida.

2. Jurisdiction lies in this court pursuant to Title 28, USC §1331 in that this is an action against state statutes which violate the United States Constitution by denying the Petitioner her Fifth and Fourteenth Amendments rights to due process and equal protection and her constitutional right of privacy.

3. The Petitioner, JANE ROE II is an alias for an adult woman, sui juris, who was born a citizen of the

United States and who is domiciled in the State of Florida and subject to the criminal statutes being challenged herein.

4. The Respondent, ROBERT BUTTERWORTH, is the Attorney General of the State of Florida and is charged with enforcement of all the laws of the State of Florida and is being sued in his official capacity as a cabinet officer and chief legal officer of the State of Florida.

5. Chapter 796, Florida Statutes, §796.02 through §796.08 are the Florida State Statutes that prohibit prostitution, the procurement thereof and various activities related to said prohibition of prostitution. Additionally, this statutory chapter provides criminal penalties for various acts of prostitution and prostitution related activity proscribed by the several sections of Chapter 796, F.S. ranging from second degree misdemeanors to second degree felonies.

6. In §796.07(1)(a), F.S., prostitution is defined as "the giving or receiving of the body for sexual activity for hire [work for pay] but excludes sexual activity between spouses." That same §796.07, F.S. makes such prostitution and related prostitution activities unlawful.

7. The abovesaid statutes, to the extent that they prohibit and make criminal prostitution and acts related thereto criminal, are unconstitutional because they directly violate the Petitioner's Fifth and Fourteenth Amendment rights to due process and equal protection and her fundamental right of privacy, and pursuant to that right of privacy, the right to control her own reproductive organs whether in a private or a commercial

transaction. See *Roe v. Wade*, 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

8. The State of Florida has no compelling interest justifying restriction of Petitioner's right of privacy and control of her reproductive organs whether privately or in a commercial transaction. See *Roe v. Wade*, supra.

WHEREFORE, the Petitioner asks this Honorable Court to declare Chapter 796, Florida Statutes prohibiting and criminalizing prostitution and prostitution related activity unconstitutional and to enjoin the Respondent from enforcing Chapter 765 Florida Statutes as it applies to the prohibition of prostitution and for costs and any other relief this Honorable Court deems appropriate.

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By: /s/ Elliot S. Shaw
ELLIOT S. SHAW, ESQ.
Florida Bar No. 184150

APPENDIX D

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 94-8681-CIV-GONZALEZ

JANE ROE II,

Petitioner,

vs.

ROBERT BUTTERWORTH,
Attorney General of the State
of Florida,

Respondent.

AFFIDAVIT OF JANE ROE, II

STATE OF FLORIDA)
) ss:
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared JANE ROE, II, who upon being first duly sworn, deposes and says that:

1. I am an adult woman sui juris, a citizen of the United States and a long-term resident of south Florida.

2. I have never been arrested or convicted of a crime in Florida or any other jurisdiction nor am I presently engaging in any illicit activity.

3. I was an honor student, have been successfully married, raised children, started and sold successful businesses and been an upstanding, active member in the

community, including charitable organizations and activities.

4. Numerous years back, for economic reasons, I was offered the opportunity to become an expensive call girl to engage in escort services and/or sexual activity for hire. I accepted this challenge and opportunity to serve both independently and with the most prestigious and famous escort service in south Florida and the United States once favorably written up in Newsweek in the 1960's.

5. This vocation required not only beauty and some sexual activity, but wit, charm and personality as well. Education and intelligence was also a definite plus.

6. Throughout the course of my years of work as a call girl, I dated and engaged in sexual activity for hire with some of the most powerful and well known businessman in the United States and the World as well as numerous diverse professionals such as doctors, lawyers, reverends and ministers, professors and even State Circuit Court and Federal Judges. Most of these clients were married. The clients also included famous professional sports starts, football coaches and Hollywood personalities and celebrities. Underneath it all, I seethed over the hypocrisy and the fact that prostitution was illegal. But most of these men did not wish to have private sexual affairs with women because of the entanglements and possible repercussions and enjoyed their control and definition of the sex for hire relationship.

7. Usually these liaisons took the form of four to five hour evening dates but there were afternoon assignations as well. One particularly interesting steady was a

local prominent attorney who insisted he had to have sex in his office before he went to Court. Sometimes, if I were willing, my clients would invite me to luxuriant travel or to visit with them out of state, sometimes in their own private jets.

8. For these "dates," in one evening, I would be paid for sexual activity and companionship substantial sums of money equivalent to what most people would consider a good week or two's wages. Most times the clients almost always paid more than they were expected to, and this was in addition to the expensive dinners and night life.

9. On top of cash payments, particularly from those men that became steadies, I was taken on exclusive shopping trips and was bought expensive jewelry and clothing. I also had a fully paid brand new automobile driven to my doorstep (I refused it), and lived aboard a 110 foot steel hulled yacht (with my small children) for almost a month which was named after a professional hockey team.

10. At all times, it was understood that these gifts and the cash were paid for primarily heterosexual sexual activity as well as companionship and compassion.

11. It has been my experience that the world of prostitution is broken down into many levels and segments as is any economic activity in society. Obviously, the most obvious and visible segment is the vulnerable streetwalker which is a very public part of the business. Unfortunately, these women usually lack education as well as social polish and grace, and because they have grown up in poor environments, they naturally gravitate

to the same type of environment which they feel most comfortable in. But it is entirely unfair and inaccurate to portray all prostitutes as streetwalkers. Streetwalkers are to prostitution as hot dog vendors and Good Humor Ice Cream trucks are to all restaurants whether McDonald's or those serving expensive continental cuisine. Streetwalking is only one small segment of prostitution, but the act of prostitution itself can take place at any level and in almost any formal or informal setting – even a woman meeting a man at a bar and making an honest proposition is sexual activity for hire. A brothel is one format which is organized economically like a shopping mall or a department store with its multi-choice of goods and services to purchase in one location. There are also women offering sex for hire that work business and political conventions or otherwise simply work at hotel bars. And just as in any other business in America, the classier, better educated, and more attractive the individual woman is, the farther she can climb in the industry, and the more fees she can command. I often wonder that if prostitution is the oldest profession in the world, then why isn't it legal since the second oldest profession, law, is. I never met a lawyer who wouldn't sell his mind and soul for a high enough fee.

12. But the "giving or receiving of the body for sexual activity for hire" goes way beyond the professional in the same way that most people who play sports are not everyday professionals, yet it's exactly the same activity. A college athlete certainly plays for their expensive scholarships. The self-promoting secretary or female executive who sleeps with her boss almost always is doing so for money, a pay raise or a job promotion. That's

sexual activity for hire; as "compensation for use of labor and services" of a woman's body. And does anyone in 1995 really believe that the gift of a diamond ring to a woman or a fur coat isn't compensation for sexual activity? Even a dinner and evening out on the town is thought of by most men (and women) to be a financial investment and compensation for sexual activity . . . sooner or later. Furthermore, in today's world where so many couples live together unmarried, if the man pays the rent, he certainly expects some sexual activity in return from his female co-habitat [sic] for this expenditure. Even if it's only $50 for the "cookie jar" for a trip together in the summer in exchange for sex, isn't that sex for hire? In fact, until recently, when women have been permitted to partake more equally in the work place, a woman's life has been totally dominated by sex for hire or she could not survive. In fact, many a marriage has occurred strictly because of the offering of sex in exchange for money. Does the state just want women to make love for free, to be nothing more than "wanton wenches," and drop illicit babies all over for the state to care for? That's unfair and ignorant. Besides, why should a married couple be different than unmarried women and men? Is having a mistress illegal? That's sex for hire, and that's unfair, too. Does sex for hire in an hour become different if it occurs for a year?

13. As already indicated above, I am not currently engaged in any so-called illegal sexual activity due to the promise I made to my attorney. However, I feel I have the constitutional right as a woman to make that decision for myself and feel imminently threatened that if I do go back into the business, or partake in other forms or

unmarried sexual activity for hire, I will be treated as breaking the law, castigated and arrested. In fact, I presently have the opportunity to return to this lucrative (and often glamorous) business of prostitution immediately which I am very interested in accepting but for the fact I face the threat of arrest and obvious personal embarrassment, public ridicule and harassment. Until the Court clearly declares that prostitution is unconstitutional and cannot be a crime, I must refrain from exercising my rights. I do not wish to see my birth name and face on Hard Copy and Current Affairs, nor do I want my beloved children and relatives involved nor do I wish to bring upon them the real possiblilty of personal embarrassment, harassment and injury. Furthermore, I have developed private businesses which could easily be damaged and destroyed as well. If there is any doubt in anyone's mind how a "prositute" can be raked over the coals, look at the recent public ridicule of Heidi Fleiss. Furthermore, while by no means a streetwalker, zealot female mayors (whose cities are rotted at the core with no real economic development) always try to divert attention from their own failures by blaming it on prostitution. And look how many good men's lives whose only sin was to look for some sexual warmth have been ruined by these demagogues causing unnecessary divorces, destroying their families and causing problems for them at work. Their real crime is that they didn't have enough money for expensive "safe sex" for hire. Heaven forbid, I always cared and showed compassion about the man I was with and never ever wanted to see them hurt or embarrassed. But any mayor who could cause so much

trouble on one level, could certainly do it at another level . . . and that could include me.

14. And, I further insist on remaining anonymous because I do not wish crank phone calls, death threats from any over zealous nut cakes like the one in Miami killing all those visible, unfortunate streetwalkers, leering looks from every male who still thinks immaturely that sex for hire is any different than a long-term marriage relationship, or police harassment, or in any other way that may injure my present high standing in the community.

15. I asked my attorney, a long time friend of mine, whether my constitutional rights were being violated. Initially, he was reluctant to look into the matter, but after research, he couldn't deny there was a long line of U.S. Supreme Court cases that established a fundamental right of privacy in sexual matters including *Roe v. Wade*. After all, if an abortionist can enter a woman's womb to vacuum a fetus to its demise, with a cash transaction from the female to the abortionist and that's deemed a constitutional fundamental right, then how can a woman not have the right to use her own reproductive organs to give away sex or charge for it as she sees fit and not have that use of her womb deemed a fundamental constitutional right? And, why are married people exempt? I don't think that's very fair at all. Most of the American population isn't even married anymore.

16. Since I feel strongly about this issue and since this issue and controversy currently effects [sic] my life once again and so imminently threatens harm to it, I am certainly an interested party who has a definite stake in

the outcome of this litigation. Accordingly, I retained my lawyer to sue on my behalf to establish that prostitution, sexual activity for hire, is already legal under the constitution and a fundamental constitutional right in order to stop the hypocrisy and unfairness to women and to at the very least put this issue on the same level as the fundamental right to an abortion.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Jane Roe
JANE ROE, II

STATE OF FLORIDA)
) ss:
COUNTY OF PALM BEACH)

I HEREBY CERTIFY that on this day before me, an officer duly authorized in the state aforesaid and in the county aforesaid to take acknowledgements, personally appeared, JANE ROE, II, known to me to be the person described in and who executed the foregoing Affidavit, and acknowledged before me that she executed the same.

WITNESS my hand and official seal in the county and state last aforesaid this 26 day of January, 1995.

[SEAL] LAURA E. AHLERS
MY COMMISSION #CC419144 EXPIRES
May 18, 1997
BONDED THRU TROY FAIN
INSURANCE, INC.

/s/ Laura E. Ahlers
(Signature of Notary Public – State of Florida)

/s/ Laura E. Ahlers
(Print Commissioned Name of Notary Public)
My Commission Expires:
Commission No.:

Personally Known [X] OR Produced Identification [ ]

Type of Identification Produced:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to John P. Goshgarin, Esq., Assistant Attorney General, Department of Legal Affairs, 4000 Hollywood Boulevard, Suite 505-S, Hollywood, FL 33021, this 10th day of February, 1995.

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By: /s/ Elliot S. Shaw
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APPENDIX E

INTERNATIONAL

Herald [LOGO] Tribune

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An Explicit Frontier on U.S. Campuses: Sex Studies

By Ethan Bronner
New York Times Service

NEW YORK – A half-century after Alfred Kinsey essentially created a new academic discipline with the publication of "Sexual behavior in the Human Male," the study of sexuality on American campuses is again being revolutionized.

In the past five years, courses examining the origin and meaning of sexual identity have appeared in nearly every catalogue of American liberal arts colleges, and the area is still growing. Unlike the short health classes taught at colleges in the past, what is now available permits students to specialize in sexuality, especially as a cultural phenomenon.

Some of the sessions are surprisingly explicit. At the University of Virginia, undergraduates in a course called Sexuality Today gather in coeducational pairs and sculpt genitals from Play-Doh. At Brown University, the owner of a female-oriented sex shop uses a latex replica of female sex organs to demonstrate new paraphernalia.

And at the State University of New York at New Paltz, sadomasochists were invited to discuss their practices.

What is noteworthy about these courses is that they spring from an area of the humanities, like history or English. The fascinating cross-cultural questions they raise have invigorated these fields, given birth to journals and established scholarly conferences.

For example, they ask: When was the term homosexual invented? How does society define man-

See SEX, Page 7

SEX: *Attempts at U.S. Colleges to Challenge Societal Conceptions of Gender and Identity*

Continued from Page 1

hood? What is the difference between sex and gender?

By contrast, what they rarely involve is pure science.

"There is still a lack of good, basic research into the fundamentals of human sexualities," said John Bancroft, an English medical researcher who now heads the Kinsey Institute at Indians University. "In other important aspects of behavior you find a much more consistent body of scientific endeavor. It is regarded as something we need to know about. Sex is not like that. There has been a long-standing fear of knowledge in that area."

Susan Tate, who teaches the three-year-old Sexuality Today course at the University of Virginia, said it was that fear she sought to address when she had students build genitals from Play-Doh.

"If we can discuss the heart, stomach and elbow without embarrassment," she said, "we should be able to

talk about the penis, clitoris and vagina without laughing. I'm trying to tell the students what's good about sex. All they hear is what's bad about it, how it can kill you."

Some of the material offered under these courses flows from women's studies. Where at one time women's studies raised issues about equal pay, the field now is often cast as gender studies and examines societal construction of sexual identity.

Much of the scholarship is grouped under the sardonic, defiant rubric of "queer theory" and challenges the view that sexuality and gender are the same thing. In other words, said David Savran, an English professor at Brown and director of its sexuality courses, sexual identity and desire are socially constructed, not innate. This school of thought is known as social constructionism.

Another school of thought, essentialism, argues that sexual orientation is innate and biologically determined. In the academy, at least among gay theorists, this view is typically rejected as harmful. It is seen to cast homosexuality as a disability that may merit sympathy but fails to challenge faulty bases of society.

Those in this field say that learning about the fringes of sexual practice, like sadomasochism and prostitution, offers insight into such issues as power and money. Tania Israel, who is studying toward a doctorate in psychology at Arizona State University, said: "It is very difficult to get at people's sexuality because the issue is so taboo. But if we want to understand sexual assault, for example, we need to understand how men and woman experience their sexuality."

That is not how critics see it.

Roger Kimball, managing editor of New Criterion, a conservative journal, drew angry attention to a sex conference at SUNY at New Paltz this fall when The Wall Street Journal published a caustic article by him under the headline, "Syllabus for Sickos."

"There is something profoundly dehumanizing about this stuff," he said in an interview. He added: "Then there is the moral question. Should one's sex life be treated in an objective way, turning sex into an activity like jogging? I don't think so. What worries me is the way sex studies tend to get rid of the whole element of love and affection and intimacy in the name of emancipation. The idea is to increase pleasure by divorcing it from all those customs and rituals and social embedding in which sexuality has always been understood. This removes the decent drapery of life."

But Richard Posner, a conservative but iconoclastic legal scholar who is chief judge of the Federal Court of Appeals for the 7th Circuit in Chicago, is not impressed with those concerns. He says that ignorance of things sexual by members of the judiciary, and by society generally, has produced woeful results.

This was brought home to him about eight years ago, he said, when he picked up Plato's "Symposium." He said he knew at the time only that it was about love. "I was surprised to discover that it was a defense, and as one can imagine a highly interesting and articulate one, of homosexual love," he wrote in his 1992 book, "Sex and Reason."

"It had never occurred to me that the greatest figure in the history of philosophy, or for that matter any other respectable figure in the history of thought, had attempted such a thing."

Judith Shapiro, president of Barnard College, has watched the growth of gender studies with some concern, but also with enthusiasm. "Through such studies, students are forced to ask the most basic questions about how society organizes itself, and that is the very essence of a liberal education," she said.

APPENDIX F

Sex Repression Laws by State and Region (Prepared and Copyrighted 1998 by National Sexual Rights Council, Inc.)

	Adultery	Fornication	Prostitution	Sodomy	Age consent
Northeast					
Connecticut	Divorce	OK	Mis & Felony	OK	16
Massachusetts	Felony	Mis	Mis & Felony	Felony	16
Vermont	Mis $500	OK	Mis	OK	16
New Hampshire	Mis	OK	Mis	OK	16
Maine	Divorce	OK	Mis	OK	14
Rhode Island	Mis	OK	Mis & Felony	Felony 7yr min	16
Mid Atlantic					
New York	Mis	OK	Mis	Mis	17
New Jersey	Divorce	OK	Disorderly	OK	16
Pennsylvania	OK	OK	Mis	Mis M exempt	16
Delaware	Forfeit	OK	Mis & Felony	OK	16
Maryland	Mis $10	OK	Mis & Felony	Felony	14
Virginia	Mis	Mis	Mis & Felony	Felony	15
West Virginia	Mis	Mis	Mis	OK	16
D.C.	Mis	Mis	Mis & Felony	Felony	16
South East					
Alabama	Mis	OK	Mis	Mis Mar xmpt	16
Arkansas	Divorce	OK	Mis	Homo only Mis	14
Georgia	Mis	Mis	Mis	Felony	14
Florida	Mis	Mis Cohabit	Mis	Mis	16
Kentucky	Forfeit	OK	Mis	Homo only Mis	16
Louisiana	Divorce	OK	Mis & Felony	Felony	14
Mississippi	Mis	Mis	Mis	Felony	14
N. Carolina	Mis	Mis	Mis	Felony	16
S. Carolina	Mis	Mis	Mis	Buggery Fel	15
Tennessee	Divorce	OK	Mis & Felony	Homo only Mis	14
Central					
Illinois	Mis	Mis	Mis & Felony	OK	17
Indiana	Forfeit	OK	Mis & Felony	OK	16

Iowa	OK	OK	Mis & Felony	OK	14
Michigan	Felony	Mis Cohabit	Mis & Felony	Felony	16
Minnesota	Voman Only Mis	Mis	Mis & Felony	Mis	16
Missouri	Forfeit	OK	Mis & Felony	Homo only Mis	17
Ohio	Forfeit	OK	Mis	OK	16
Wisconsin	Felony	OK	Mis & Felony	OK	18
Plains to Texas					
N. Dakota	Mis	OK	Mis & Felony	OK	15
S. Dakota	Divorce	OK	Mis & Felony	OK	16
Nebraska	Mis	OK	Mis & Felony	OK	16
Kansas	Mis	OK	Mis & Felony	Homo Only Mis	16
Oklahoma	Felony	Male Felony	Mis	Felony	16
Texas	Divorce	OK	Mis	Homo only Mis	17
Mountain					
Arizona	Mis	Mis	Mis & Felony	Mis	18
Colorado	Mis	OK	Mis	OK	15
Idaho	Felony	Mis	Mis & Felony	Felony	18
New Mexico	Divorce	Mis	Mis & Felony	OK	16
Montana	OK	OK	Mis	Felony	# 16
Utah	Mis	Mis	Mis & Felony	Mis	17
Wyoming	OK	OK	Mis & Felony	OK	16
Far West & Non Contiguous					
Alaska	Divorce	OK	Mis	OK	15
California	OK	OK	Mis & Felony	Mis in Prison	18
Hawaii	OK	OK	Mis	OK	14
Nevada	OK	OK	Mis & Felony	* OK	16
Oregon	OK	OK	Mis & Felony	OK	16
Washington	OK	OK	Mis & Felony	OK	16
TOTAL	21 Mis + 5 Felony	16 Mis + 1 Felony	51 Mis 21- also felony	16 Mis + 14 Felony	Norm 16

Notes

- Some states consider adultery as a grounds for divorce only. Some consider it grounds to forfeit property due from a marriage. In Minnesota only the woman is guilty!

- In Oklahoma fornication is a felony but only the male is the offender.
- All states consider commercial sex a misdemeanor. 21 provide additional felony charges for Promoting, Advancing, or Pandering.
- * Nevada has licensed brothels by county option in "rural" counties. Sodomy is considered oral as well as anal sexual contact. It is unlawful in California only in prisons. Some states make exception for married persons. Some states criminalize only same sex activity.
- Age of consent listed is generally for an adult and consenting minor partner. Almost all states differentiate for your people where one partner is less than 2 to 5 years older than the other.

Montana Supreme Court has just (6/97) struck down their sodomy laws on grounds of privacy

Repression Scale

Some states get into individuals private lives more than others

Most intrusive: Idaho, Massachusets, Michigan
Least restrictive: Alaska, Hawaii, New Jersey

Compiled from: "America's Sex Laws" – Posner & Silbaugh – University of Chicago Press (1996)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 94-8681-CIV-GONZALEZ

JANE ROE II,

Petitioner,

vs.

ROBERT BUTTERWORTH,
Attorney General of the State
of Florida,

Respondent.

_____/

AFFIDAVIT OF HAROLD JOSEPH KENNEDY

STATE OF FLORIDA)
) ss:
COUNTY OF POLK)

I, HAROLD JOSEPH KENNEDY, do hereby depose and state under oath to the fullest extent of my knowledge as follows:

1. I reside at 5890 Linden Road, Haines City, Florida 33844. I am 72 years old having been born May 16, 1923. My wife has recently died of cancer on August 18, 1995 at the age of 65 years after a wonderful 47 year, 10 month marriage, and I am still bereft. We had six natural children born of the marriage, two of which are deceased. We also adopted a child, now 29 yrs old, who is mentally disabled and physically handicapped which adoption

stemmed from my wife's involvement with the mentally handicapped and our founding of the Kent Center for the mentally disabled in Maryland. This adopted son presently lives with me as he must be taken care of.

2. On June 12, 1941 in Camden, New Jersey, at the age of 18, I enlisted in the United States Army to be stationed in the Philippines. Nonetheless, I was assigned to the Island of Oahu, Territory of Hawaii, Schofield Barracks in August, 1941. I was stationed at those Schofield Barracks until the latter part of 1942.

3. During my Army assignment on Oahu, on December 7, 1941, we were immediately called to order by the officers and transported to Pearl Harbor. One of my first sights that day, when I first experienced the horrors of war, was watching the Battleship Arizona "turtle" over. Because the military brass at that time were convinced that the Pearl Harbor attack would continue with more waves of Japanese planes, I trundled 240mm shells down the Hawaiian Hills to the batteries of Coast Guard guns placed around the Harbor.

4. After my duty assignment in Hawaii, I finally got my wish to visit the Philippine Islands, but it was hardly as expected. I was made a forward observer and radio operator which required being in the first wave of attack jumping out of the lowered bow of Higgins boat landing craft under intense Japanese fire into the surf and onto the sandy beaches. It was a harrowing experience, and I was scared to hell. I took part in the first attack wave of the U.S. landing operations on Goodenough Island, Mindoro and Leyte, and I also made one terrifying landing in New Guinea. While dug into the sands on the

beachheads, we were continuously shelled and bombed all day and all night which was an experience you can never get used to or get out of your mind years later.

5. I was honorably discharged from Army service May 28, 1945. Despite being recommended several times by officers to Officer Candidate School (OCS), the commanding officer always nixed these recommendations because they wanted me upfront where they said "I belonged" because I was good at what I did. Accordingly, I remained a private throughout my enlistment. I feel that I served my country very well putting my life on the line for it over and over again being at constant risk. I am a "true blue" American who loves his country dearly and would never wish to see it harmed. No one has a higher claim to love of country and national commitment than I.

6. When I returned to the States, I proceeded back into civilian life getting married in 1947. At first I became a cost accountant and worked for such clients as the Pennsylvania and New Jersey Turnpikes and then I became a roofing contractor for 25 years starting in 1960. As you can see, my life after Pearl Harbor was pure "apple pie" American in the heartland, obviously with a very strong sense of true family values and honest morality. I am a life member of the Veterans of Foreign Wars, a member of the FLA American Legion and the Pearl Harbor Survivors Association.

7. Looking back, almost immediately upon arriving at Schofield Barracks in Oahu in August 1941, I learned from the other soldiers that there were a number of brothels on the island. To the best of my information and belief and as a matter of common knowledge at the

barracks, during the 1920's and 1930's the men far exceeded the number of women on the island, and there were many women raped giving grave concern to the military. It was also common knowledge amongst the soldiers that the brothels were sanctioned, approved and supervised by the U.S. government. I personally was an active participant in these brothels purchasing the sexual services of the women therein. There were usually long lines of U.S. soldiers waiting to pay $2.00 for straight sex and some $3.00 for any variation thereof. My known brothel was the Honolulu Rooms on Hotel Street. There were no surreptitious efforts to secret these houses of prostitution by the U.S. military nor to restrict the active and frequent participation of U.S. soldiers in these houses of prostitution. To the contrary, they were clearly protected and seemingly even promoted and encouraged.

8. While no official government or military papers were seen by the enlisted men, there was no doubt, even to unsophisticated 18 and 19 year olds like myself, that the U.S. military and government were directly sanctioning and supervising and heavily involved with these brothels. There were always military policemen or Navy shore patrols guarding these houses of prostitution; not so much because of misconduct with the women, but because of drunken fighting amongst the soldiers. Furthermore, in talking with the women and as a matter of common knowledge, I learned that military doctors from the Army, Navy and Marines examined the women regularly once a month for venereal disease. To the full extent of my knowledge and belief, there were no material incidents of venereal disease. I personally did not generally know of, talk to or see anyone with a case of VD.

9. Additionally, I was told by the prostitutes themselves and as a matter of common knowledge, that the women in the brothels were specially recruited and brought to Hawaii by the U.S. government in private ships or clipper planes. Most worked one or two years in the brothels, amassed substantial money, and to the best of my knowledge, became "respectable" women when they went back to the mainland blending back into everyday society and marrying servicemen and others. To the best of my knowledge and belief, all the women in the brothels were Americans. A minority were Asian women, but they were also living in the States in the San Francisco Bay area. In fact, the U.S. government authorities were so concerned about the welfare of these women in the brothels that they made sure each and every women [sic] had a U.S. issue gas mask in case of another surprise attack. While I have no actual knowledge, I suspect that these women were registered and given certificates after physical and medical examinations and background clearance checks. To the best of my belief and information and as a matter of common knowledge, the rapes decreased dramatically and became minimal on the island.

10. Many of my fondest memories during the bombing and shelling on the beachheads were the warm and friendly women at the brothels who taught me about sex and shared their feminine charms and intimacy with me. This is perhaps the one activity of the U.S. military that I am indeed indebted to them for. The variety of sexual experience that I obtained as a young soldier also served me well during my 48 years of happy marriage and family life and good citizenship.

11. My testimony in this affidavit was not solicited. After reading about the Jane Roe II case in my local newspaper, I telephoned Elliot Shaw, Esq. who the paper said was Jane Roe II's attorney. Because of my early experience with the prostitutes in Hawaii being so positive, I wanted the opportunity to come forth and relate my story to Mr. Shaw because I think what he and his client are doing is right and helpful to American sexual honesty and homelife. The sexual lies have caused nothing but misery and catastrophe to the women, the Johns, the cities and the country as a whole.

12. Just prior to Thanksgiving, 1995, Mr. Shaw called me back and asked if I would be willing to give the Court an affidavit in support of Jane Roe II's case. I did not hesitate to say yes with full understanding that the Court records are public in this nationally exposed and heavily watched case. I also stand willing to voluntarily submit to a deposition on the facts in this affidavit at the behest of the State of Florida or anyone else. Mr. Shaw has also informed me that an octogenarian from Norem, Nevada called on about the same day I telephoned to state essentially the identical story I have told about the government sanctioned prostitutes on Oahu after reading about the Jane Roe II case in his local Nevada newspaper.

13. It would be untrue and inaccurate to say that the U.S. government has never been involved directly in sanctioning prostitutional activities during peace time or war time, and frankly, it was with much success. As a true blue and committed American, I support Jan Roe II's constitutional case against Florida's criminal laws against prostitution wholeheartedly for the good of this great country of ours.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Harold Joseph Kennedy
HAROLD JOSEPH KENNEDY
Affiant

STATE OF FLORIDA)
) ss:
COUNTY OF POLK)

I HEREBY CERTIFY that on this day before me, an officer duly authorized in the state aforesaid and in the county aforesaid to take acknowledgments, personally appeared, HAROLD JOSEPH KENNEDY, known to me to be the person described in and who executed the foregoing Affidavit, and acknowledged before me that he executed the same, this 1st day of December, 1995.

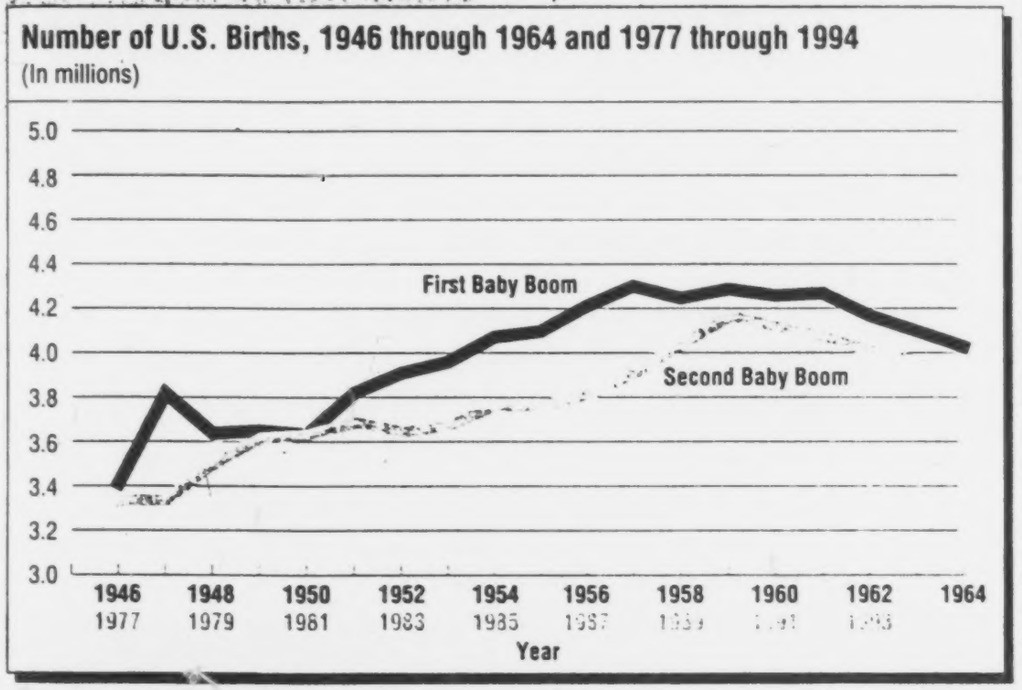
/s/ Alice Markey

OFFICIAL NOTARY SEAL
ALICE MARKEY
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. cc383417
MY COMMISSION EXP. AUG. 4, 1998

APPENDIX H

Baby Boomers and Their Babies

The baby-boom generation, born between 1946 and 1964, produced their own smaller boom between 1977 and 1994.



Source: National Center for Health Statistics

THE SINGLES SCENE

MORE AMERICANS are going it alone.

It used to be that the most common American household consisted of married couples with children, reminiscent of the days of *Ozzie and Harriet* when people usually moved straight from their parents' homes into their own life-long marriages. Many of the people back then who lived alone were poor and on the fringe of society.

But today, a quarter of American households – or roughly 25 million – include just one person. That compares with a mere 7.4% of households 50 years ago, according to the Census Bureau. And the proportion of single-person households is expected to continue to climb into the next century. The Census Bureau projects that 27% of households will consist of a single person by 2010, outnumbering households with married couples and children.

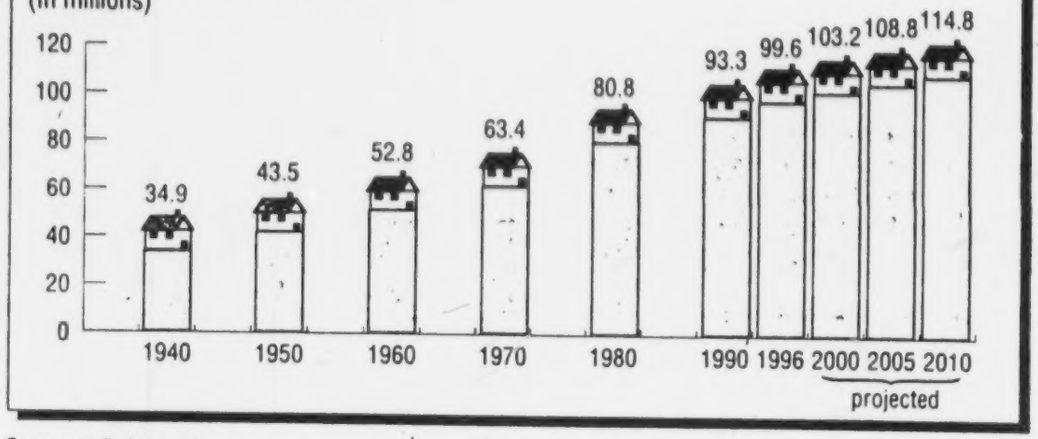
The increase in single-person households is being driven by two primary forces: delayed marriage and lifestyle changes among the elderly. In 1995, the median age for marriage was 26.9 for men and 24.5 for women, compared with 22.8 for men and 20.3 for women in 1950. At the same time, elderly Americans, particularly women, are wealthier, more independent, and living longer than ever before.

It's also less of a taboo to be alone. "Society has accepted the single lifestyle," says Michael S. Broder, a psychologist in Philadelphia and author of *The Art of Living Single*. Prime-time television shows like *Seinfeld*

and *Friends* are loaded with images of young adults having problems finding the right mate and preferring to stay single. Nowadays, people are more likely to end their bad relationships and marriages, striking out on their own, says Dr. Broder. "There also are more broken engagements than there used to be."

In fact, a growing number of people are adjusting to the idea that they could be single for life, some researchers say. "I hear more and more people saying 'I may be single forever.' Some of them want it that way," says Judith Langer, president of Langer Associates

Slower Household Growth



Source: U.S. Census Bureau

Inc., a market-research and consulting company in New York.

Lisa Skriloff, a self-employed, marketing consultant and newsletter editor in New York, doesn't want it that way. Ms. Skriloff, 42 years old, says she'd like to marry some day, but like so many other singles, she's delayed marriage because she feels she simply hasn't met the right match. So, Ms. Skriloff, who is childless, has been putting her energy and money into building her small business – a three-year-old enterprise. "In a way, my business is kind of my parents' grandchild," she says.

Marketers of many stripes have taken note of the single-household trend, targeting consumers with products that defy the stereotypes of the swinging bachelor or the old maid. For example, *Singles In Sight*, a fledgling magazine in Phoenix, features the typical personal-ad fare with photos and profiles of people looking for mates, but it also includes personal-finance information. the magazine draws ads that range from real estate to retail, plastic surgery to health insurance.

"It used to be that you lived with orange crates as bookcases until you got married," Ms. Langer says. Not anymore. Many singles are "nesting," purchasing homes, furniture and cars, and making more use of financial services. "People are satisfying their lifestyle in every way," says Delia Passi, publisher of *Single Living*, a national magazine aimed at unmarried adults that has lured ads from the automotive and travel industries. Single adults are "a very valuable consumer."

Marketers also are benefiting from the fact that single living is becoming more common among the elderly. The trend is particularly evident among women who tend to

outlive their older husbands but are choosing not to move in with their adult children. The "assisted living" industry, for example, is expanding fast, offering alternative housing to the elderly who need some support, but not nursing-home care. "Most of these companies are adding anywhere between 20 and 40 facilities a year," says Peter Sidoti, an industry analyst at Schroder & Co., in New York. Compared with nursing homes, assisted-living centers "are superior in terms of life-style in that the resident still has independence."

The number of single elderly is expected to increase, both because of the aging of the large baby-boom generation and the steady increase in life expectancy. At birth today, females are expected to live close to 80 years, compared with about 73 years for men, according to George P. Moschis, director of the Center for Mature Consumer Studies at Georgia State University in Atlanta. That's a dramatic increase from a life expectancy of 71 for women and 66 for men in 1950. "The socioeconomic status of women in particular has been increasing," Prof. Moschis says. "There is less of a need to remarry and be supported by a husband."

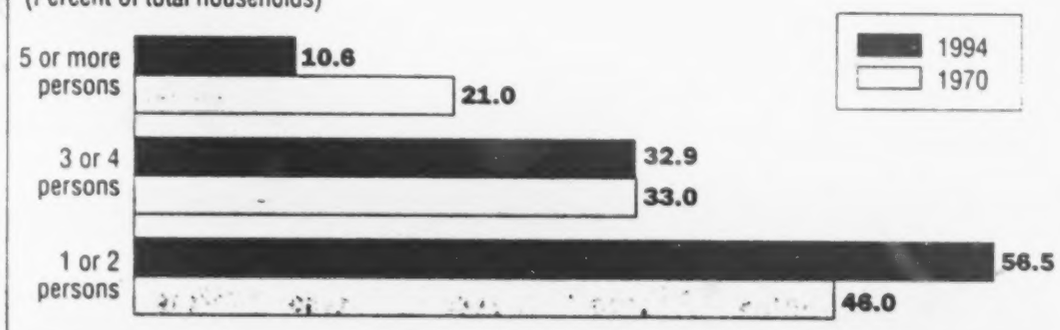
That was the case with Minnie R. Combs of Oxford, Miss., who has no children and has lived on her own since her husband died in 1981. The 86 year-old moved from her own home in 1996 into a retirement community called Azalea Gardens that offers both "independent" and "assisted" living arrangements. Ms. Combs chose an independent option: a two-bedroom apartment and one meal a day in the center's dining room. "I still drive; I'm very independent," says Ms. Combs, who also enjoys cooking for herself in her apartment's kitchen.

Lisa Brownlee

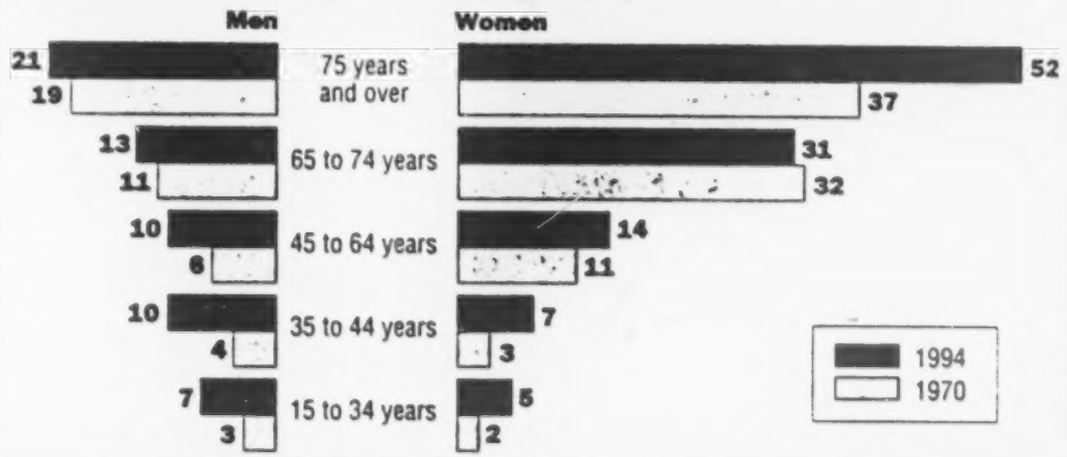
Small and Solitary Households

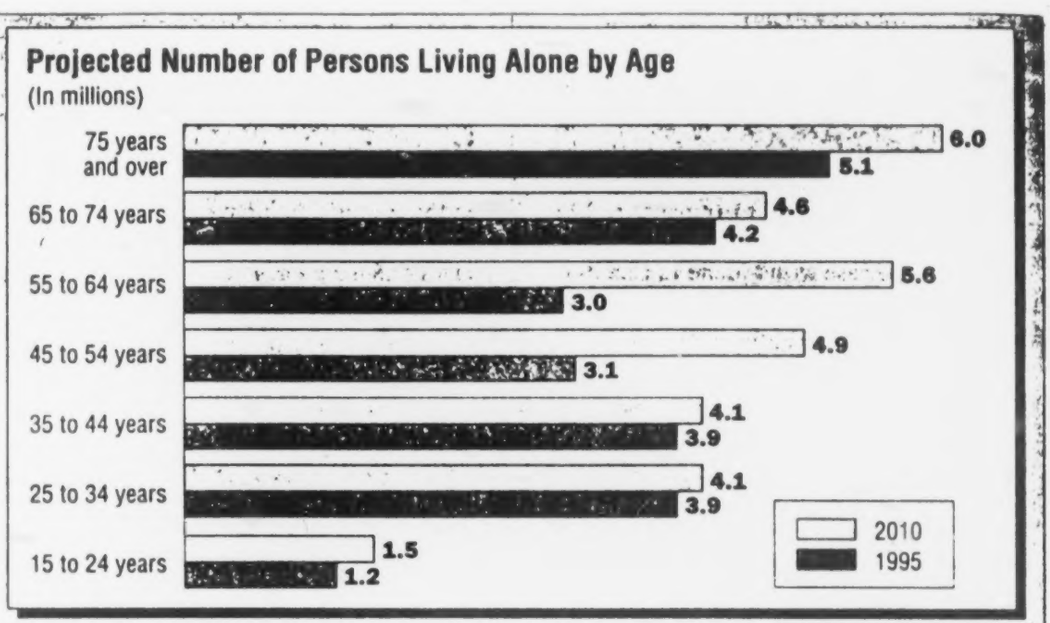
Households by Size

(Percent of total households)



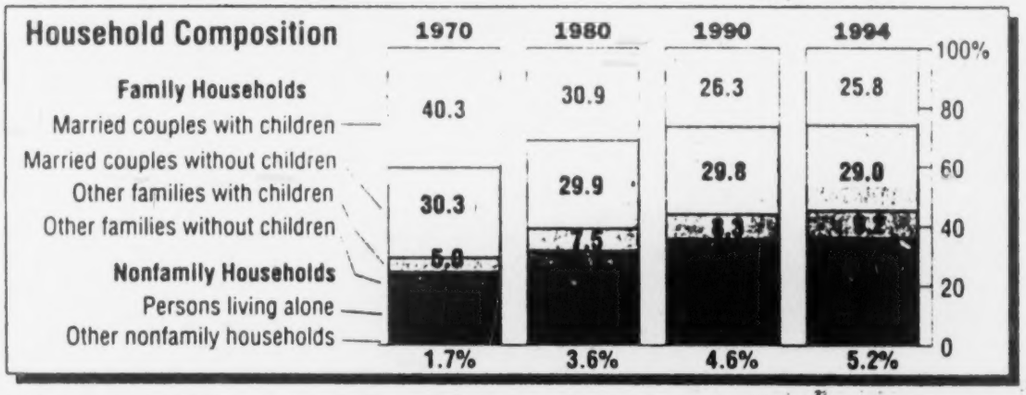
Percent of Adults Living Alone, by Age and Sex





Source: U.S. Census Bureau

Fewer Traditional Families



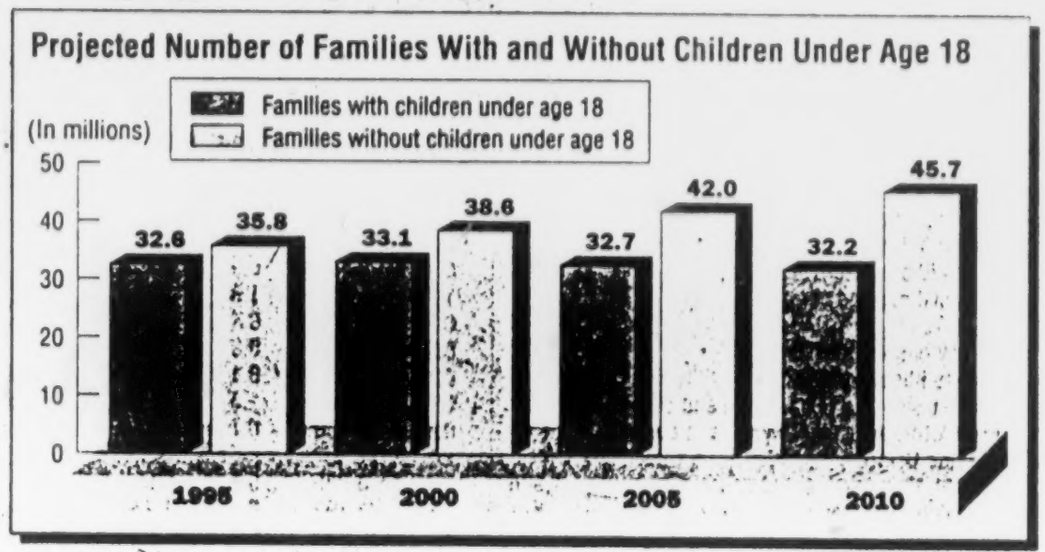
Family Households, by Type, Race, and Hispanic Origin of Householder

Type of family	Number (In thousands)					Average annual percent change		
	1970	1980	1990	1993	1994	1970–1980	1980–1990	1990–1994
All Races								
Family households	51,456	59,550	66,090	68,216	68,490	1.5	1.0	0.9
Married-couple families	44,728	49,112	52,317	53,090	53,171	0.9	0.6	0.4
Male householder, no wife present	1,228	1,733	2,884	3,065	2,913	3.4	5.1	0.3
Female householder, no husband present	5,500	8,705	10,890	12,061	12,406	4.6	2.2	3.3

Type of family	Number (in thousands)					Average annual percent change		
	1970	1980	1990	1993	1994	1970–1980	1980–1990	1990–1994
White								
Family households	46,166	52,243	56,590	57,669	57,870	1.2	0.8	0.6
Married-couple families	41,029	44,751	46,981	47,383	47,443	0.9	0.5	0.2
Male householder, no wife present	1,038	1,441	2,303	2,418	2,297	3.3	4.7	-0.1
Female householder, no husband present	4,099	6,052	7,306	7,868	8,130	3.9	1.9	2.7
Black								
Family households	4,856	6,184	7,470	7,982	7,989	2.4	1.9	1.7
Married-couple families	3,317	3,433	3,750	3,777	3,714	0.3	0.9	-0.2
Male householder, no wife present	181	256	446	467	450	3.5	5.6	0.2
Female householder, no husband present	1,358	2,495	3,275	3,738	3,825	6.1	2.7	3.9
Asian or Pacific Islander								
Family households	(NA)	818	1,531	1,760	1,737	(NA)	6.3	3.2
Married-couple families	(NA)	691	1,256	1,409	1,426	(NA)	6.0	3.2
Male householder, no wife present	(NA)	39	86	106	79	(NA)	7.9	-2.1
Female householder, no husband present	(NA)	88	188	245	232	(NA)	7.6	5.3
Hispanic								
Family households	2,004	3,029	4,840	5,733	5,940	4.1	4.7	5.1
Married-couple families	1,615	2,282	3,395	3,940	4,033	3.5	4.0	4.3
Male householder, no wife present	82	138	329	445	410	5.2	8.7	5.5
Female householder, no husband present	307	610	1,116	1,348	1,498	6.9	6.0	7.4

Source: U.S. Census Bureau

Changing Family Composition

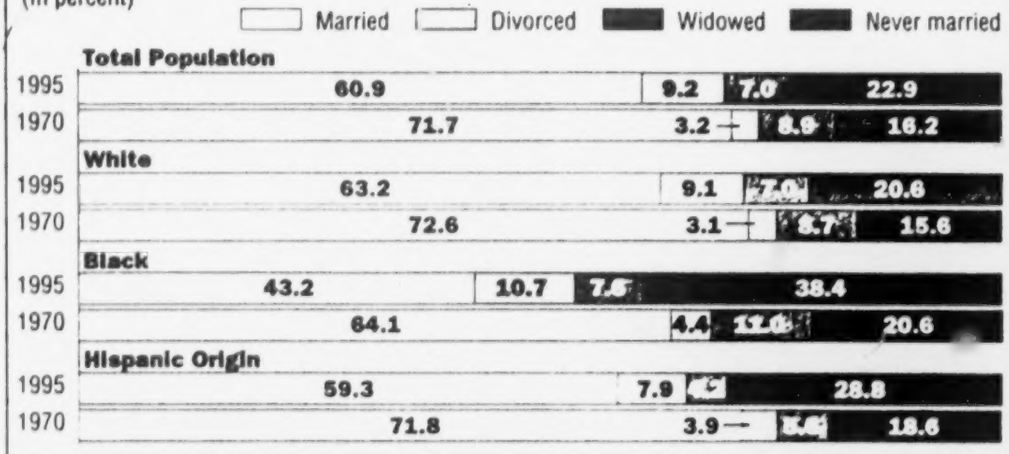


Source: U.S. Census Bureau

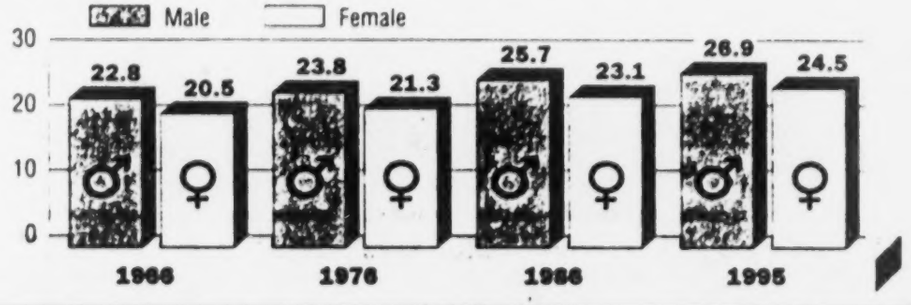
The State of Matrimony

Marital Status of Persons 18 Years and Over, by Race and Hispanic Origin

(In percent)



Median Age at First Marriage, by Sex



Married Couples of Same and Mixed Races and Origins

(Numbers in thousands)

Race and origin of spouses	1980		1990		1995	
	Number	Percent	Number	Percent	Number	Percent
Race						
Same race married couples	48,264	97.1	50,889	95.6	51,733	94.2
White/White	44,910	90.3	47,202	88.6	48,030	87.4
Black/Black	3,354	6.7	3,687	6.9	3,703	6.7
Interracial married couples	651	1.2	964	1.8	1,392	2.5
Black/White	167	0.3	211	0.4	328	0.6
Black husband/White wife	122	0.2	150	0.3	206	0.4
White husband/Black wife	45	0.1	61	0.1	122	0.2
White/other race (excl. White and Black)	450	0.9	720	1.4	988	1.8
Black/other race (excl. White and Black)	34	0.1	33	0.1	76	0.1
Hispanic Origin						
Hispanic/Hispanic married couples	1,906	3.8	3,085	5.8	3,857	7.0
Hispanic/not Hispanic married couples	891	1.8	1,193	2.2	1,434	2.6

Source: U.S. Census Bureau

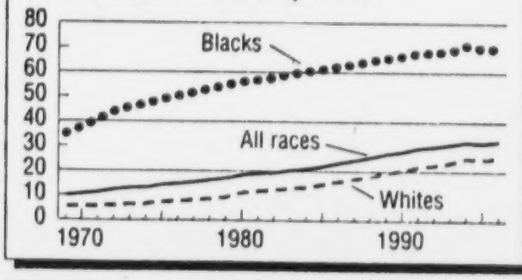
Single Mothers

Percentage of Births to Unmarried Women

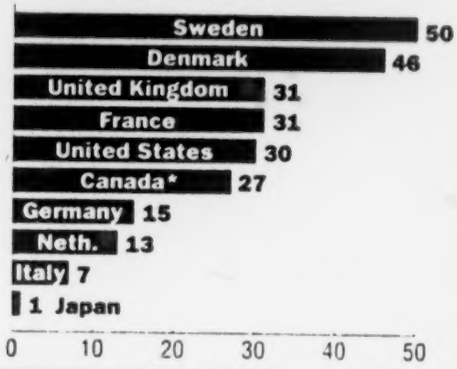
Year	All	Whites	Blacks
1940	3.8	–	–
1950	4.0	–	–
1955	4.5	–	–
1960	5.3	–	–
1965	7.7	–	–
1970	10.7	5.5	37.5
1975	14.3	7.1	49.5
1980	18.4	11.2	56.1
1985	22.0	14.7	61.2
1986	23.4	15.9	62.4
1987	24.5	16.9	63.4
1988	25.7	18.0	64.7
1989	27.1	19.2	65.7
1990	28.0	20.4	66.5
1991	29.5	21.8	67.9
1992	30.1	22.6	68.1
1993	31.0	23.6	68.7
1994	32.6	25.4	70.4
1995	32.2	25.3	69.9
1996	32.4	25.7	69.8

Source: National Center for Health Statistics

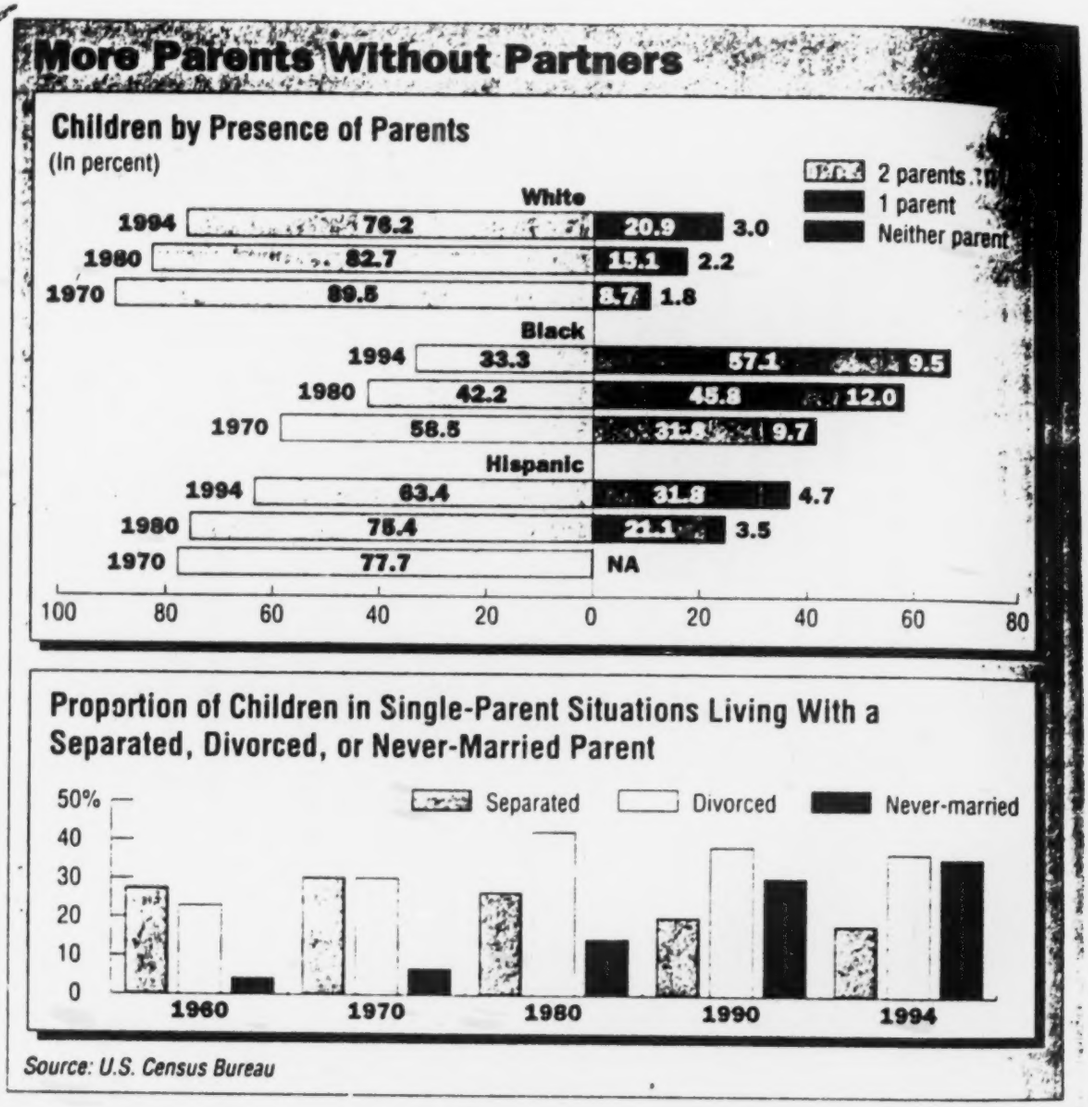
Percentage of Births to Unmarried Women by Race



Percentage of Births to Unmarried Women by Country, 1992



*1991 data.
Source: Department of Health and Human Services


More Parents Without Partners
Children by Presence of Parents
(In percent)
2 parents
1 parent
Neither parent
White
1994 76.2 20.9 3.0
1980 82.7 15.1 2.2
1970 89.5 8.7 1.8
Black
1994 33.3 57.1 9.5
1980 42.2 45.8 12.0
1970 58.5 31.8 9.7
Hispanic
1994 63.4 31.8 4.7
1980 75.4 21.1 3.5
1970 77.7 NA
100 80 60 40 20 0 20 40 60 80
Proportion of Children in Single-Parent Situations Living With a Separated, Divorced, or Never-Married Parent
50%
40
30
20
10
0
Separated
Divorced
Never-married
1960
1970
1980
1990
1994
Source: U.S. Census Bureau

APPENDIX I

SEX BIAS IN THE U.S. CODE

A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS
April 1997

ACKNOWLEDGMENTS

A report prepared under contract no. CR3AK010 by Brenda Feigen-Fasteau, Ruth Bader Ginsburg, and 15 students from the Columbia Law School, New York City was used as the basis for the Commission study. Ms. Ginsburg is professor of law at the Columbia Law School and Ms. Feigen-Fasteau, former director of the American Civil Liberties Union's Women's Rights Project, is a practicing attorney in New York City. The Commission is indebted to them for their work and the work of the Columbia Law School students.

The Commission is also indebted to staff members Shirley Bergert, Claudia Booker, Gladys T. de Chaves, Lucy Edwards, and Gail Gerebenics, and to interns Roger Burke, Catherine Crockett, and Joan Gilmore, students from the Antioch School of Law, Washington, D.C.

Impetus for this study and subsequent consultation was provided by the Commission's Womens' Rights Program Unit.

All the writers are particularly indebted to Laura Chin for her editorial assistance.

Final preparation of this report was the responsibility of Audree B. Holton and Bobby Wortman in the Publications Support Center, Office of Management.

The project was directed and completed under the overall supervision of Lucy Edwards, Assistant General Counsel, Lawrence B. Glick, Acting General Counsel, and Richard Baca, General Counsel.

* * *

Title 18 – Crimes

Sex-Based References:

18. U.S.C. §§113, 714, 1111, 1114, 1153, 1384, 1735, 1737, 1952, 2031, 2032, 2198, 2421, 2422, 2423, 2424, 3056, 3185, 3242, 3567, 3614, 4082, 4251, 4321

Several of the sections listed on the printout are not sex discriminatory in substance but do raise terminological questions. Principal substantive differentials inconsistent with the equal rights principle appear in sections penalizing prostitution and related offenses, seduction, statutory rape, and rape. To eradicate sex-based discrimination in the catalogue of crimes, all retained sections with gender distinctions should be recast in sex-neutral form.

Within recent years there has been a growing legal movement in this country advocating the decriminalization of prostitution, i.e., laws classifying or referring to prostitution or solicitation by or on behalf of a prostitute should be repealed. Sections referring to the Federal Reformatory for Women and the National Training Schools for Boys require modification as part of an encompassing program to eliminate unwarranted sex segregation in correctional institutions.

* * *

During the 93d Congress, a number of rape-related bills were introduced. These fell into two categories, those which provided for research and those which redefined Federal rape laws. The first category is exemplified by Section 303 of H.R. 14214, the Health Revenue Sharing and Health Services Act of 1974, vetoed by the President but subsequently passed, which would have established a National Center for the Control and Prevention of Rape in the National Institute of Mental Health to "conduct research into the legal, social and medical aspects of rape" and to disseminate information and provide training materials related to rape prevention and control. (See H.Rept. No. 93-1524, 93d Cong., 2d Sess. (1974)).

S. 1, S. 1400/H.R. 6046, and H.R. 10047, which would have provided for a major revision of Federal substantive and procedural criminal law, each contained provisions redefining the Federal offense of rape to conform with the equal rights principle.

Prostitution

Title 18 encompasses the crime of prostitution in several sections: 18 U.S.C. §1952(b) (forbidding the use of interstate commerce with intent to distribute the proceeds of any unlawful activity, includes prostitution as defined under State law or the law of the United States); 18 U.S.C. §1384 (prohibiting prostitution and the related activities of solicitation, procuring, setting up a house of ill fame, or using vehicles or buildings for prostitution near a military base); and 18 U.S.C. §§2421-24 (the Mann Act,

prohibiting travel and transportation of women in interstate or foreign commerce for prostitution, debauchery, or other immoral purposes). The Mann Act also calls for registration of information about a recently entered alien woman or girl engaged in the business of prostitution; the registrant is then shielded from use of the information in a criminal prosecution.

These prostitution proscriptions are subject to several constitutional and policy objections. Prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973). But sex-neutralizing the statutory language is unlikely to effect significant substantive change, for enforcement concentrates on the female even when male prostitution is encompassed in the same category. With the exception of several communities where it is police policy to arrest the client also, it is realistic to expect that vigorous enforcement will be directed against the person who patronizes a prostitute.[38]

The Mann Act suffers from additional problems. It prohibits the transportation of women and girls for prostitution, debauchery, or any other immoral purpose. This language, which is not confined to illegal acts but encompasses "immoral" conduct as well, appears too broad and vague to the point where fair notice of the activity proscribed is hardly supplied. Moreover, the proscription is not limited to situations in which there is a financial factor. Thus, the act poses the invasion of privacy issue in an acute form.

The Mann Act also is offensive because of the image of women it perpetuates. In the year it was passed, the alien prostitution importation act (penalizing the entry of any alien for the purpose of prostitution) was amended to include boys as well as girls. The Mann Act was directed to a different group; it was meant to protect from "the villainous interstate and international traffic in women and girls," "those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens." H.R. Rep. No. 47, 61st Cong., 2d Sess. 9-11 (1909). As the courts consistently proclaimed, the act was meant to protect weak women from bad men. See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917); *Gebardi v. United States*, 287 U.S. 112 (1932).

S. 1400 §1841, introduced during the 93d Congress, defined and limited prostitution-related conduct subject to criminal penalty, and concentrated on financially-motivated prostitution business. The bill defined prostitution as engaging in a sexual act (as defined in S. 1400 §1636(a)) as consideration for anything of pecuniary value and prostitution business as the derivation of profits from prostitution by a person who acts under the control or supervision of another person.

Although S. 1400 §1841, in contrast to the Mann Act which it would replace, is cast in sex-neutral form, retaining prostitution business as a crime in a criminal code is open to debate. Reliable studies indicate that prostitution is not a major factor in the spread of venereal disease,[39] and that prostitution plays a small and declining role in organized-crime operations.[40]

18 U.S.C. §3056, providing Secret Service protection for the wife of a former President during his life and for the widow until her death or remarriage, should be extended to cover the spouse or surviving spouse of a woman President.[41]

* * *

This report recommends alteration of pronoun usage throughout the Senate bill S. 1400 to conform with the proposed sex-neutral terminology format. S. 1400 retains use of the masculine pronoun to cover individuals of both sexes.

18 U.S.C. §1153 – Eliminate the phrase "carnal knowledge of any female, not his wife" and substitute offense as set forth in S. 1400, §1633. a Federal, sex-neutral definition of the offense patterned after S. 1400 §1633.

A sex-neutral definition of rape, such as the one set forth in S. 1400 §1631 should be added to Title 18 or Title 10 and referred to throughout for the definition of the offense.

18 U.S.C. §§113, 1111, 2031, 3185, 3242, 4251, – These need no change if a sex-neutral definition of rape is adopted.

18 U.S.C. §1153 – Change "female" to "person," and revise this section so that Native Americans are tried in Federal court under Federal law.

18 U.S.C. §4082 – Change the name and eliminate the single sex character of the National Training School for Boys.

18 U.S.C. §4321 – Change the name and eliminate the single sex character of the Federal Reformatory for Women as part of the larger reorganization of the Federal correctional systems necessitated by the equal rights principle.

18 U.S.C. §§1384, 1952(b), 2421-2424 – Repeal these section.

(Note: These sections are the Federal laws criminalizing prostitution. See P. 96, 97 infra)

Footnote 40

THE CHALLENGE OF CRIME IN A FREE SOCIETY

A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE

* * *

Other Goods and Services. Prostitution and bootlegging play a small and declining role in organized crime's operations. Production of illegal alcohol is a risky business. The destruction of stills and supplies by law enforcement officers during the initial stages means the loss of heavy initial investment capital. Prostitution is difficult to organize and discipline is hard to maintain. Several important convictions of organized crime figures in prostitution cases in the 1930's and 1940's made the criminal executives wary of further participation.

* * *